BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

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| In the Consolidated Matters of:<br><br>PARENTS ON BEHALF OF STUDENT,<br><br>v.<br><br>SANTA CRUZ CITY SCHOOL DISTRICT, SANTA CRUZ COUNTY OFFICE OF EDUCATION, AND SANTA CRUZ COUNTY CHILDREN'S MENTAL HEALTH SERVICES. | OAH CASE NO. 2011060037 |
| SANTA CRUZ CITY SCHOOL DISTRICT,<br><br>v.<br><br>PARENTS ON BEHALF OF STUDENT. | OAH CASE NO. 2011060387 |

**DECISION**

Administrative Law Judge Deidre L. Johnson, Office of Administrative Hearings (OAH), State of California, heard this matter on August 8 through 10, and 15 through 17, 2011, in Santa Cruz, and on September 6, and October 5, 2011, in Soquel, California.

Valerie J. Mulhollen, Attorney at Law, represented Student and his Parents (Student).[1] Mother was present during the hearing. Student did not attend the hearing.

Daniel A. Osher, Attorney at Law, Lozano Smith, represented the Santa Cruz City School District (District). District's Director of Special Education Lynette Seibel was present during the hearing. Janna L. Lambert, Attorney at Law, School and College Legal Services of California, appeared on behalf of the Santa Cruz County Office of Education (County). County's former Director of Special Education, Halard Ledbetter was present during most of the hearing. County's Special Education Director Dorothy Raab was present during some of the hearing. Betsy L. Allen, Assistant County Counsel, appeared for Santa

[1] Margaret Broussard, Attorney at Law, was also present for some of the hearing.

Cruz County Children's Mental Health Services (CMH). CMH's Program Manager Kathy Cytron was present throughout the hearing.

Student filed his request for a special education due process hearing (complaint) in this case with OAH, designated OAH Case No. 2011060037, on June 1, 2011. District filed its complaint, designated OAH Case No. 2011060387, on June 9, 2011. On June 15, 2011, OAH granted a motion for consolidation of the two cases and designated that statutory timelines would be controlled by Student's case. On July 6, 2011, OAH granted a continuance of the consolidated cases.

At the hearing, oral and documentary evidence were received. At the request of the parties, the record remained open until October 18, 2011, for their submission of written closing arguments. On October 18, 2011, the parties submitted closing briefs, the record was closed, and the matter was submitted for decision.

## ISSUES[2]

The issues for hearing are limited to those alleged in Student's and District's respective complaints.

*Student's Issues:*

*Issue 1:* For the period from August 2009, through May 30, 2011, did District, County, and CMH deny Student a free appropriate public education (FAPE) because they significantly impeded Parents' opportunity to participate in the individualized education program (IEP) decision-making process by failing to accurately report Student's academic progress, attendance, and behavior data to Parents?

*Issue 2*: For the period from August 2009, to the present, did District, County, and CMH deny Student a FAPE because they failed to offer appropriate special education and related services as follows:

(a) Annual goals that met his unique needs related to his disabilities;
(b) A special education program or placement reasonably calculated to provide meaningful educational benefit;
(c) An appropriate behavior support plan (BSP);

[2] Student's issues in his complaint and in the Order Following Prehearing Conference dated August 2, 2011 (PHC Order), were organized chronologically by IEP date. Here, the issues have been reorganized, reworded, and reframed by subject for clarity and consistency. At the outset of the hearing, Student's motion to change the wording of his issues as described in the PHC order was denied as the reorganization, rewording, and reframing of the issues does not substantively change Student's issues in light of the applicable law.

(d) Appropriate mental health goals and related counseling and guidance services; and
(e) Beginning on May 19, 2010, an appropriate transition plan and related transition services?[3]

*Issue 3:* For the period from August 2009 through May 30 2011, did District, County, and CMH deny Student a FAPE because they materially failed to implement the following components of Student's last operative IEP:

(a) Direct specialized instruction for 360 minutes daily;
(b) Annual IEP goals;
(c) Accurate reporting to Parents of Student's academic progress, attendance, and behavior data;
(d) Positive BSP; and/or
(e) Mental health counseling and guidance services?

*Issue 4:* For the period from August 2009, to the present, in addition to the above claims, did CMH deny Student a FAPE because it:

(a) Failed to provide mental health services in a safe and effective manner;
(b) Failed to have a psychiatrist and therapist who accurately diagnosed Student and accurately reported findings; and/or
(c) Significantly impeded Parents' opportunity to participate in the IEP decision-making process by failing to:
(1) Provide documents to Student in a timely manner and free of cost; and/or
(2) Properly investigate and intervene regarding a mental health therapist's improper conduct and communications with Student?

*District's Issue:*

*Issue 5*: Does the District have the right to assess Student in specified areas related to his disabilities set forth in the April 15, 2011 assessment plan without parental consent?

[3] Student's complaint articulated a separate transition issue for the May 24 2011 IEP offer. However, Student's closing argument sheds no light on any legal distinction between the two transition offers and they have therefore been combined into one issue.

## REQUESTED REMEDIES

Student requests that OAH issue an order that the public agencies are jointly and severally liable for denying him a FAPE, and an order for them to provide Student with compensatory education in the form of two years of placement in a residential treatment center; along with individual and family therapy; and individual academic instruction by an educational specialist. In addition, Student requests an order for CMH to investigate the conduct of a mental health specialist involved in this case and award Student 208 hours of individual and family therapy.

In District's case, District requests an order that it may assess Student without parental consent pursuant to its assessment plan dated April 15, 2011, in specified areas related to his psychological social and emotional, and behavioral levels of functioning.

## CONTENTIONS OF THE PARTIES

In general, Student contends that District, County, and CMH were responsible for Student's education under the law, and that all three public agencies should therefore be jointly and severally liable for the violations claimed in his complaint (except for the problems in Issue 4 that are directed solely against CMH). Primarily, Student contends that, beginning in August 2009, the public agencies' six IEPs through May 2011 failed to offer him appropriate placement and services because they should have offered him an educational placement and services in a therapeutic residential treatment center (RTC), instead of a "collaborative County/Mental Health" day class. Student further asserts that the public agencies failed to implement the IEPs to which Parents did consent, thereby denying him educational benefit and a FAPE. Finally, Student asserts that CMH denied him a FAPE by allowing its mental health therapists to undermine his therapeutic counseling and IEP programs and services, failing to accurately diagnose and report findings, and failing to properly handle an incident with a therapist in the spring of 2011.

District contends that all of its IEP offers from May/November 2009 through May 2011 offered Student a FAPE in the least restrictive environment in a County program for pupils with an emotional disturbance disability, and that Student did not require a placement in a residential treatment center in order to receive educational benefit.

County contends that it did not have an independent obligation to provide Student a FAPE because only the District is the responsible local educational agency (LEA) in this case and that County should therefore be dismissed as a party or prevail on that basis. CMH also contends that it does not have any independent obligation to provide to Student with a FAPE and should therefore be dismissed as a party or prevail on that basis. CMH argues that it is a mental health agency, not an educational agency, and that the law with regard to its obligations to provide mental health related services for pupils with IEPs has undergone significant revision and its prior obligations have been suspended and rendered inoperative, subject to repeal. The contentions of County and CMH relating to their status as a party,

including the jurisdiction of OAH relative to certain time periods at issue in this case, are analyzed in the Legal Conclusions. As determined in the Legal Conclusions, both County and CMH are proper parties to this action.

## FACTUAL FINDINGS

*Jurisdiction and Background*

1. Student was born in October 1994, was over 16 years old during the time of the hearing, and turned 17 in October 2011. Student is eligible for and receives special education and related services under the disability category of Emotional Disturbance.

2. In 2004, Student was medically diagnosed with Attention Deficit Hyperactivity Disorder Combined Type (ADHD), Anxiety Not Otherwise Specified (NOS), Depressive Disorder NOS, and Asperger's Disorder. In 2006, the Children's Health Council found he had ADHD, Dysthymic Disorder, Anxiety NOS, and a Developmental Reading Disorder.[4]

3. Student was first found eligible for special education under the category of Emotional Disturbance in April 2007, while in sixth grade at New Brighton Middle School in the Soquel Union Elementary School District (Soquel). In connection with Student's initial IEP, the Soquel IEP team noted that Student suffered "inconsistent homework completion, frequent tardies and absences, frequent behavioral issues and distractibility." Parents had difficulties getting Student up and dressed for school and often had to carry or deliver him to school. He was failing most of his classes, only completed school work about 10 percent of the time, and engaged in negative behaviors with his peers (including insults, threats, name-calling, bullying, and seeking negative attention). Student engaged in other inappropriate behaviors at school, such as rolling on the floor and cutting himself, and was suspended from school many times.

4. Special education law provides that therapeutic mental health services are a related service that may be necessary for a pupil to benefit from his or her education. At times applicable in this case, Chapter 26.5 of the California Government Code set forth a comprehensive system by which a local education agency (LEA) could refer a special education pupil suspected of being in need of mental health treatment to a local CMH agency. In the fall of 2007, Soquel referred Student to CMH under Chapter 26.5, referred to by the parties as AB 3632, to determine if he was eligible for educationally related mental health services.

5, Following an assessment by CMH, Student was made eligible for AB 3632 educationally related mental health services in November 2007. Student displayed extreme

[4] In addition, CHC advised that Student should be monitored for Rule Out Bipolar Disorder, which indicated that Student was possibly at risk for that disorder.

withdrawal and acting out behaviors, absenteeism, including 114 absences in the 2006-2007 school year, and disruptive defiant and attention seeking behaviors. In December 2007, Student was placed in a structured special education classroom for pupils with Emotional Disturbance, operated by County. CMH's counseling services and interventions were imbedded in the program, designed to address the unique needs of the pupils. In addition, CMH provided individual mental health therapy services for Student. He remained in the placement through the remainder of his middle school years.

6. For the time periods involved in the present case, beginning in August 2009, Student matriculated from middle school to high school and was transferred to Harbor High School, operated by the District. District is a member of the North Santa Cruz County (NSCC) special education local plan area (SELPA), as is Soquel, and also utilizes the County ED Program to place pupils with Emotional Disturbance who require a small structured educational setting not otherwise available in the District. Accordingly, Student was transferred into the ED Program at Harbor High School (Harbor High).

*Student's Operative IEPs*

7. On May 19, 2009, in preparation for Student's transition from Soquel to the District for his ninth grade year in high school, Soquel held an IEP meeting at which Student was offered placement in a County ED Program, operated by County and located on the campus of Harbor High in the District. However, Parents did not consent to the IEP at that time. The IEP team meeting was continued to November 19, 2009, where some revisions to the IEP offer were made to address Parents' concerns. Parents signed the May/November 2009 IEP on December 16, 2009, and it went into effect on that date.[5] Thus, from the day Student's ninth grade year began in August 2009, until December 16, 2009, Student's May 2008 IEP was his operative IEP. Other than those revisions, which went into effect in mid-December 2009, the public agencies were not placed on notice of any new or different circumstances regarding Student's academic or functional performance that gave rise to a duty to convene another IEP meeting and consider further revisions to his program before his next annual next annual IEP meeting in May 2010.

8. Student's next IEP was dated May 19, 2010, and went into effect when Mother signed her consent on June 10, 2010.[6] Student's next IEPs were dated January 20, and

[5] Father signed consent to the IEP on December 16, 2009. Prior to that date, Student's last agreed upon IEP dated May 12, 2008, remained in effect. Student identified the May 19, 2009 IEP as the only IEP at issue for the 2009-2010 school year, and the PHC Order clarified that issue accordingly. Thereafter, Student did not make any motion to include the May 2008 IEP in the PHC Order or otherwise request reconsideration. Therefore, Student's May 2008 IEP is not at issue in this proceeding.

[6] Mother's consent on June 10, 2010, noted the following exceptions: "goals for math, [which] need to be higher, and need for specialist to help with spelling and grammar skills. Would like clarification on mental health goal (more specific)."

February 23, 2011. Parents did not consent to the January 2011 IEP, but did consent to the February 23, 2011 IEP, as an addendum to Student's May 2010 IEP. Student's next IEP was dated April 24, 2011. Parents provided only partial written consent on April 26, 2011. Student's next IEP was dated May 24, 2011, and Parents signed consent to that IEP on May 31, 2011.

*Procedural Denial of FAPE*

9. A pupil with a disability has the right to a FAPE under the federal Individuals with Disabilities in Education Improvement Act (IDEA) and California law, which includes special education and related services. There are two parts to the legal analysis of whether a public agency offered a pupil a FAPE, whether the LEA has complied with the procedures set forth in the IDEA, and whether the IEP developed through those procedures was substantively appropriate. Not every procedural violation is sufficient to support a finding that a student was denied a FAPE. To constitute a denial of FAPE, the procedural inadequacy must have (a) impeded the child's right to a FAPE, (b) significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE, or (c) caused a deprivation of educational benefits.

*Denial of Parental Participation*

10. IDEA's procedural mandates require that the parent be allowed to meaningfully participate in the decision-making process and the development of the IEP. A parent is a required and vital member of the IEP team. The requirement that parents participate in the IEP process ensures that the best interests of the child will be protected, and acknowledges that parents have a unique perspective on their child's needs.

11. Student contends that District, County, and CMH significantly impeded his Parents' opportunity to participate in the IEP decision-making process by failing to accurately report to them Student's academic progress, attendance, and behavior data. As set forth in more detail in evaluating the IEP offers at issue in this case, and whether the IEPs were implemented, the evidence established that none of the IEPs required staff to physically deliver to Parents detailed written attendance or behavioral logs but all IEPs required academic progress summary reports every trimester.

12. The evidence established that at each IEP meeting, in which Mother or both Parents fully participated, District, County, and CMH staff regularly summarized Student's then-present levels of performance and his academic and functional progress, including summarizing his academic, attendance, and behavior data. The record shows that staff emailed Mother data sheets and school staff called Parents when Student was absent. Parents generally knew when Student was tardy or absent because he was at home at those times.

13. Parents did not establish that they were deprived of material information necessary to understand their son's school performance and meaningfully participate in the IEP process. The record demonstrates that they fully participated in each IEP meeting,

communicated their concerns to the other members of the IEP team, asked questions, criticized components of the offers, and negotiated for revisions to annual goals, Student's class schedule, study materials and other matters. Accordingly, the public agencies did not deny Student a FAPE on that basis.

*Substantive Denial of FAPE*

14. Student contends that District, County, and CMH denied him a FAPE during the time periods at issue because their IEPs failed to offer: (a) annual goals that met his unique needs related to his disabilities; (b) a special education program or placement reasonably calculated to provide meaningful educational benefit; (c) an appropriate BSP; and/or (d) appropriate mental health counseling and guidance services and related mental health goals.

15. A public agency responsible for providing special education must provide special education and related services to meet a pupil's unique needs related to his or her disability. For an IEP to offer a substantive FAPE, the proposed program must be specially designed to address the pupil's unique needs and be reasonably calculated to provide some educational benefit. The IEP is to be evaluated as of the time the offer was made, in light of the information available at the time, and is not to be judged in hindsight.

*Annual Goals to Meet Student's Unique Needs*

16. A pupil's IEP must contain a statement of measurable annual goals that are designed to meet the child's needs related to the disability to enable the child to be involved in and make progress in the general education curriculum. Student contends that his annual goals for the 2009-2010, and 2010-2011 school years were not measurable, were not updated, and/or were not otherwise appropriate to meet his needs.

17. For the time periods at issue in this case, Student's IEPs all contained annual goals. Some of the goals were revised and rewritten at various IEP meetings. In general, although not perfect, the following annual goals were in compliance with the law, reasonably calculated to meet Student's unique needs related to his disability, and were also measurable: (a) a mental health goal for improving Student's focus and attention; (b) a mental health goal for improving his ability to regulate his emotions, (c) a math calculation goal; (d) a behavioral goal for complying with school staff requests; (e) a behavioral goal for positive interactions with staff and peers, (f) a behavioral goal to reduce negative attention seeking behaviors; and (g) a vocational goal for beginning to plan postsecondary life.

18. However, Student's annual goal for written expression (Goal 1) was not in compliance with the law. Beginning in mid-December 2009, the goal provided that by May 2010, Student would create written compositions that established a main idea, had a coherent thesis, and ended with a "clear and well-supported conclusion," on his choice of topic at grade level with 80 percent accuracy on four out of five trials. Student's baseline level of

performance was that he had "difficulty" completing written assignments. Progress on the goal was not measurable as there was no way to determine his starting level of performance.

19. The evidence established that there was no change to Student's written expression goal until May 24, 2011. The lack of any change in the goal demonstrated lack of progress in written expression and that Student was unable to meet the goal for two years. Although lack of progress does not necessarily establish that a goal was inappropriate when first offered, once the IEP team sees that there is no progress, a duty arises to revisit the goal. Here, once the IEP team saw that Student made so little progress on the goal, it should have been revised. However, this goal was immeasurable from the outset. It remained immeasurable for a year and a half, and was therefore inappropriate.

20. At the May 24, 2011 IEP, District eliminated Goal 1 and offered three different written expression and language goals instead of the written expression goal, all focused on having Student write two four-to-five paragraph essays, one expository and one persuasive, using specified writing criteria. The new goals were all measurable and appropriate. Thus, District cured the inappropriate written expression goal in the May 24, 2011 IEP.

21. Student's two annual goals to arrive at school on time (Goal 4) and to attend school (Goal 5) were also not in compliance with the law. The tardiness goal provided that Student would arrive at school on time and attend with 95 percent accuracy, as measured by attendance records. It provided a baseline that Student was able to identify what triggered his anger as of May 2009, but noted that he still had difficulty identifying feelings or processing difficulties. The baseline did not provide a measurable starting point for Student's timeliness or tardiness. For the May 19, 2010, and January 20, 2011 IEPs, the goal remained the same, indicating a lack of progress on the goal and a lack of revision to make the goal more attainable, as further discussed below.

22. The attendance goal provided that Student would identify and utilize positive strategies to deal with anger triggers as measured by appropriate classroom behaviors with 95 percent accuracy, as documented in the behavior data collection system. Student's BSPs in his IEPs provided for use of a daily data point system to monitor his behaviors and provide rewards and incentives. This goal utilized the same baseline as Goal 4 above and therefore did not provide a measurable starting point for Student's attendance at school.

23. Annual Goals 4 and 5 did not provide for gradual increases in Student's proficiency over time but expected him to meet the full goal of 95 percent performance from the outset over a short-term measurement. Using attendance and behavior data were reasonable measurement methods. However, as noted above, there was no baseline data provided for these goals at any time between May 2009 and January 2011. In addition, the evidence did not establish that Goals 4 and 5 were appropriate to deal with Student's chronic absenteeism and tardy arrivals to school. Aside from Student's BSP, and mental health counseling, there were no other supports in the IEPs to assist Student to progress on the goals. Moreover, since Student's propensity for daily tardiness was an accommodation in his

IEPs, the tardiness goal did not define what tardy behavior was targeted. The BSP did not address ways to get Student to school aside from incentive points once he got there, and the mental health counseling was designed as periodic therapeutic support. The goals provided no methods or strategies and attempted to bridge unmentioned and undefined gaps between the home and the school. Accordingly, both goals were inappropriate, by themselves, to address the targeted behaviors.

24. In the May 24, 2011 IEP, District combined Goals 4 and 5 into one revised Attendance/Schedule goal that eliminated the tardiness goal and noted Student's baseline level of performance as "emerging," in that Student had been able to attend to his school responsibilities "with the extra intensive staff support," for eight out of 11 days. The annual goal provided that by May 24, 2012, Student would independently fulfill his school and work responsibilities for 18 out of 20 days in one month, as measured by the behavior data collection system and attendance records. Thus, the May 2011 goals included extra staff supports to assist Student. Overall, the new goal was measurable and was appropriate to meet his needs.

25. Based on the foregoing, Goal 1 for written expression was not measurable from December 2009 through May 2011. In addition, Goals 4 and 5, to come to school on time, and to attend school, were not measurable and not otherwise appropriate to meet Student's needs in those areas, absent additional supports in the IEPs. The violations were cured in the May 2011 IEP. Therefore, the lack of appropriate goals in those areas denied Student a FAPE from December 2009 through May 2011.

*Appropriate Placement in the Least Restrictive Environment*

26. Student contends that District's and County's offer of educational placement in the County ED Program at Harbor High, from December 2009 through May 2011, denied him a FAPE because they should have offered to place him in a more restrictive environment in a residential treatment facility. The public agencies contend that the evidence does not support placing Student in a restrictive residential treatment center.

27. The IDEA provides that a pupil with a disability must be educated in the least restrictive environment in which she can be satisfactorily educated. This means that a pupil must be educated with nondisabled peers to the maximum extent appropriate and may not be removed from the regular education environment unless necessary to receive a FAPE due to the nature and severity of the pupil's disability. To determine whether a special education pupil may satisfactorily be educated in a regular education environment, the following factors must be balanced: 1) the educational benefits of placement in a regular class setting; 2) the nonacademic benefits of such placement; 3) the effect the pupil had on the teacher and children in the regular class; and 4) the costs of mainstreaming. Costs were not an issue in this case. If a pupil is not able to be appropriately educated in the general education setting, the question is whether the pupil has been mainstreamed to the maximum extent that is appropriate given the continuum of program options.

28. The evidence established that all of the professionals who worked with Student including District, County, and CMH staff, did not believe Student required a residential placement in order to benefit from his education. All of Student's operative IEPs from December 2009 through May 2011 offered him an educational placement in the County ED Program for teens located on the campus of Harbor High. Thus, Student had already been removed from the mainstream general education setting several years earlier. All of the IEPs provided that Student would be in special education 90 percent of the time, and in general education 10 percent of the time.

29. After Student matriculated into the ED Program at Harbor High, the evidence established that his behaviors while at school significantly improved, and that his attendance improved somewhat as well. CMH conducted a mental health school assessment for Student on October 16, 2009, prior to the November 2009 IEP meeting. The assessment provided baseline levels of performance for Student's two mental health goals adopted by the IEP team, and recommended continued mental health counseling and school accommodations. While Student's difficulties with anxiety and motivation to attend school were noted, CMH recommended his continued placement in the structured ED Program and did not recommend any change of placement to a more restrictive setting.

30. An IEP meeting was held on November 19, 2009. Student attended the meeting with Parents, along with his County special education teacher Tom Simpkins, his CMH AB 3632 therapist, Bob Beito, and many others. Student and Parents participated fully in the IEP team meeting and asked and responded to questions. The IEP team meeting notes recorded Parents' report that things were going much better for Student at Harbor High, compared to his middle school. Although attendance was still an issue, they were pleased that Student was happier at school and available to discuss issues. The IEP team noted that Student was not having conflicts with staff members and that the daily school charting of his levels of compliance and cooperation corroborated that improvement. The IEP offered placement in the ED Program.

31. At hearing, Mother testified that Parents did not make the above statements, that Student's performance at school was not improved, and that he was experiencing a downward cycle of emotional turbulence during the fall of 2009. However, Mother's testimony was not credible and was not supported by any other evidence. There was no reason for the IEP team to have misconstrued Parents' reports of progress at that time, and independent witnesses corroborated the nature of the discussions at that meeting. In addition, Parents did not seek to correct the IEP meeting notes before they consented to the IEP in mid-December 2009.

*Triennial Assessment in May 2010*

32. Despite lack of progress on some of Student's annual goals, the subsequent IEP team meetings from May 2010 through May 2011 also documented that Student made some educational progress in the ED program at Harbor High, particularly in areas of compliance and cooperation with staff and peers. For Student's IEP on May 19, 2010, the

County SELPA conducted a triennial psychoeducational assessment, by Shelley Cabanillas, a County school psychologist. In addition, Student's teacher, Mr. Simpkins, administered an academic assessment on which Student's reading score was in the post high school range; his spelling score was in the sixth grade range; and his math score was in the eighth grade range.

33. Ms. Cabanillas found that Student performed cognitively in the average to above average range compared to his peers. Processing speed was an area of weakness for him. In the social-emotional domain, Ms. Cabanillas administered the Behavior Assessment System for Children Second Edition (BASC-2), which revealed that Student reported less concerns with his behaviors compared to the findings in his 2007 assessment. Student reported that his hyperactive behaviors were in the "at risk" range, meaning that they needed close monitoring. On the other hand, Mother responded to the BASC-2 survey with many of Student's behaviors in the "clinically significant" range, which signified behaviors that could indicate a "high level of maladjustment," including hyperactivity, aggression, and conduct problems (externalizing problems). Student's teacher, however, scored those externalizing problems in the at-risk range, along with others. Overall, Ms. Cabanillas concluded that Student's attendance continued to be problematic and he had 36 absences and 12 tardies on his formal attendance records. She reported to the IEP team that Student was making an increased effort to attend school, and enjoyed his job provided through the school workability program. Ms. Cabanillas recommended that the IEP team continue to encourage Student's daily attendance, and support his desire for more mainstreaming opportunities. Her assessment did not note any areas of severe emotional or behavioral concern that called for consideration of Student's removal to a more restrictive setting.

34. At the May 19, 2010 IEP team meeting, District and County offered to continue to place Student in the ED program at Harbor High for the remaining weeks of ninth grade and for the upcoming 2010-2011 school year in tenth grade. Student did not contend that the triennial assessment was not in compliance with the law. Student had not engaged in any behaviors of the sort that gave the public agencies notice that he needed a more restrictive environment. Both his special education teacher and the County school psychologist reported to the IEP team that Student had made some steady progress. In fact, the school psychologist encouraged more mainstreaming opportunities. The fact that some of Student's annual goals were inadequate also did not support a residential placement. Based on the foregoing, the May 19, 2010 IEP offer of placement was in the least restrictive environment and was reasonably calculated for Student to receive educational benefit, and did not deny him a FAPE.

*Fall 2010 Progress in 10th Grade*

35. The evidence established that Student made progress in the fall of 2010 in tenth grade. While Student's attendance fluctuated, Student actively participated in school once he got there. In connection with the January 20, 2011 IEP team meeting, Student's teacher, Mr. Simpkin, gave the IEP team an update on Student's levels of academic and functional performance, and reported that Student did a "great job" in the workability program when he attended school. Mr. Simpkin also reported that Student "has exhibited

age appropriate study skills at school and has returned some homework." Since Student had expressed an interest in computers, the military, and going to college, however, Mr. Simpkin observed that Student would need to improve his attendance in order to improve his academics. Student was also improving socially and had friends.

36. Student's AB 3632 mental health therapist, Mr. Beito, also established that Student attended school more frequently in the fall of 2010, and that when he did attend, he got along well with his peers. Mr. Beito holds bachelor's and master's degrees in psychology, has been a licensed marriage and family therapist since 1978, and has been employed with the County for 20 years. Beginning in about July 2009, Mr. Beito met with Student once a week for individual therapy, and met with Parents at least bi-weekly. Mr. Beito was persuasive that he saw a direct correlation between times when Parents were consistent in implementing positive strategies and reinforcers in the home and Student's attendance at school. For example, when Parents forcibly tried to remove Student from his bed, he reacted negatively, and was tardy or absent. Mr. Beito worked with the family to limit Student's access to electronic devices such as television or the computer in the evening, so that he would not stay up all night, and would then tend to go to school. Student also actively participated in the group mental health therapy sessions with other pupils. Student performed well in his off-campus work to learn job skills in the workability program. Mr. Beito was persuasive that Student made some progress in the fall of 2010, and did not require a residential placement.

37. CMH senior mental health therapist Alan Friedman also worked with Student during 2010. Mr. Friedman holds bachelor's and master's degrees in psychology and counseling, has been a licensed marriage and family therapist for 11 years, and has been employed with the County for over 12 years. He obtained a teacher's credential in 1987 and worked as a special education resource and special day class teacher. Mr. Friedman has provided mental health therapy services to over 100 pupils with Emotional Disturbance and established that inconsistent school attendance is not unusual for pupils with an Emotional Disturbance disability. Mr. Friedman worked with the County ED Program at Harbor High to provide on-site therapeutic supports where he met Student on numerous occasions and facilitated his group therapy sessions throughout 2010. Mr. Friedman testified persuasively that he found Student to be accessible, articulate and a natural leader in group sessions, but he needed to learn to be a better listener. In addition, in late January 2011, he was assigned to replace Mr. Bieto as Student's individual mental health therapist. Based on his years of experience and training, Mr. Friedman testified persuasively that in 2010 and in 2011, Student, despite his emotional problems, was not in crisis in a downward spiral of emotional regression at school and would not have benefited from a residential treatment placement. Mr. Friedman's testimony was corroborated by that of CMH psychologist Meg Sandow, and persuasively established that such a placement would be detrimental to Student's emotional well being, including significant feelings of loss, grief, betrayal, and rejection. Mr. Friedman was persuasive that in order to obtain Student's participation, sensitivity and patience, rather than coercion, was required.

*January 2011 and Offer for HHI*

38. On January 12, 2011, Mr. Beito met with Student and Dr. Robert Brown, Student's psychiatrist at CMH, for a CMH medication management meeting. Mr. Beito noted that since the winter break, Student's school attendance had declined. However, Student responded positively to them and was "energetic" about being on a bicycle racing team. Mother then joined the meeting and informed them that Student was very depressed and needed his medications to be adjusted. Mr. Beito established that both he and Dr. Brown were puzzled about her information, as Student had not appeared to them to be depressed.

39. The next IEP team meeting on January 20, 2011 had been scheduled to review Student's progress. Mother reported that Student had deteriorated emotionally and required a residential treatment placement. At that meeting, the team discussed that Student's medications were being adjusted, and agreed to offer to place Student on home hospital instruction (HHI) pending the stabilization of his medications. The public team members informed Parents that they needed a physician's note in order to begin the HHI services.[7] None of the public agencies had sufficient information at the time of this IEP meeting to conclude that Student required a restrictive residential placement at that point and the reports of Student's progress from his teachers and therapists indicated otherwise. Mr. Beito and other team members attempted to discuss alternatives to residential placement with Mother. However, as Mr. Beito reported to CMH, Mother was not open to any other options and had selected a specific treatment facility in Reno, Nevada.

40. Based on the foregoing, the January 2011 IEP offer for temporary HHI services, followed by continued placement in the ED Program at Harbor High was reasonably calculated to provide Student educational benefit, and did not deny him a FAPE. Following this IEP team meeting, Student stopped coming to school until May 2011. Parents did not provide a doctor's note so that the public agencies could provide HHI services and no HHI services were therefore implemented during the time that Student was out of school.

*February and April 2011 IEP Meetings*

41. Between January 20, and early May, 2011, Student did not attend school, or attend any individual mental health counseling sessions with either Mr. Beito or his

[7] When recommending placement for home instruction, the IEP team must have a "medical report from the attending physician and surgeon or the report of the psychologist, as appropriate, stating the diagnosed condition and certifying that the severity of the condition prevents the pupil from attending a less restrictive placement." (Cal. Code Regs., tit. 5, § 3051.4, subd. (d).)

successor, Alan Friedman.[8] District and County convened an IEP meeting on February 23, 2011, at Parents' request. Mother requested an expanded IEP team meeting under AB 3632 to include appropriate CMH personnel to consider her request for a residential placement. At that IEP meeting, the team considered many alternative options to try to address Parents' concerns prior to making a residential placement. The public agency IEP team members proposed to conduct a functional analysis assessment (FAA) of Student's behaviors in order to gain information about what was triggering his reported behaviors of refusing to attend school. In addition, the agencies proposed having a paraprofessional go into the home to assist Student to get from home to school. Finally, the agencies proposed increasing Student's mental health counseling. The evidence established that Parents refused all of the offers for additional services at that time.

42. At the next IEP team meeting on April 13, 2011, District and County again offered to conduct an FAA to understand Student's behaviors and then to have a Special Circumstances Instructional Assistant (SCIA, or aide) to go into the home understanding his behaviors and assist Student to come to school. The IEP team members also considered having CMH conduct a psychological assessment and consider increasing mental health support services. Another alternative considered was a concurrent enrollment in an independent study program along with use of a SCIA to help Student attend school part time. Parents and their attorney declined to consider most of the offered services, including any assessments, and maintained their request for a residential placement.

43. After a lengthy discussion, the April 13, 2011 IEP offered continued placement in the ED Program, along with increased individual, family, and group AB 3632 mental health counseling and guidance services. The IEP also offered career awareness and other transition services. Finally, the IEP offered a SCIA beginning on April 13, 2011, for 400 minutes five times a week, or 2000 minutes weekly, to assist Student "in transitioning to and from school." An additional 60 minutes a month was offered for training.

44. By an attachment to the April 13, 2011 IEP, dated April 15, 2011, Parents partially consented to selected components of the IEP, although they expressly stated that they continued to believe the offered placement and services would not provide Student with a FAPE. Parents consented to: (a) the offer for a SCIA to be with Student for the full school day, including meeting Student at home, getting him ready and escorting him to school, staying with him at school "for the entire day," then escorting him back home; (b) a "full day program" at school in the ED Program; (c) an agreement that District and CMH would ensure that two specified CMH therapists would not initiate contact with Student; and (d) individual, family and group therapy and medication management through CMH with specified limitations.

*May 2011 Return to School and IEP Meetings*

[8] On January 26, 2011, Mother informed CMH that she no longer wanted Mr. Beito to be Student's therapist, after he did not support her request for a residential placement at the January 20, 2011 IEP meeting.

45. In late April 2011, District implemented the SCIA service by hiring Easter Seals, a nonpublic agency (NPA), as the service provider for Student's behavioral intervention. In early May 2011, Larry Doan, a qualified Easter Seals marriage and family therapist with over 12 years of experience, met with Student in his home with a trained SCIA aide to transition him back into school. Mr. Doan's approach was to help motivate Student so that he would internally "buy into" the return to school. Mr. Doan learned that Student wanted to earn money through the school workability jobs. Student began attending school regularly with the SCIA's assistance for over two weeks before inconsistencies in his attendance resurfaced.

46. During May 2011, Student was accepted into a short term medical research project at Stanford University. On May 20, 2011, Parents submitted to the public agencies a one-page letter from Dr. Kiki Chang, Associate Professor, Director, Pediatric Mood Disorder Program, at Stanford University School of Medicine. Dr. Chang stated in the letter that Student had been diagnosed "with Bipolar Disorder, Type 1, general anxiety disorder, and attention deficit disorder, combined type." Dr. Chang's letter advised that symptoms associated with these disorders could significantly interfere with Student's school performance. Dr. Chang did not testify at hearing.

47. Dr. Chang's letter made recommendations for accommodations at school that included giving Student extra time for assignments and tests; breaking down large projects into smaller tasks, and using shorter deadlines and rewards. In addition, Dr. Chang's letter recommended a school counselor. She did not recommend a residential treatment placement. The physician's recommended accommodations were already either part of Student's IEP, or imbedded in the ED Program, and Student was already receiving mental health counseling.

48. Student's next annual IEP team meeting began on May 24, and was continued to May 31, 2011. By the time of this meeting, as found above, Student had been back in school for over two weeks and was doing well with the assistance and behavioral intervention of the SCIA aide. Thus, the public agencies had positive data showing that Student responded to the interventions. During the IEP meeting, Parents and their attorney reiterated their request for a residential placement, and the team considered a variety of options.

49. The District and County members of the May 2011 IEP team offered Student a continued placement in the ED program at Harbor High school with all of the intensive supports that had been previously offered in the April 13, 2011 IEP. Consistent with that IEP, the May 24, 2011 IEP offered increased AB 3632 individual, family, and group counseling and guidance, career awareness, and other transition services. The IEP also offered continued SCIA services, increased from 400 to 425 minutes a day, for a total of 2175 minutes a week, to assist Student to transition to and from school; plus 60 minutes a month for training. In addition, the IEP offered behavior intervention services from an NPA for 1200 minutes yearly, as described: "[o]n average, two hours a month. Behavioral support services provided at school, as well as consultation/collaboration provided for home

and school." The IEP offered the behavioral intervention services to provide trained behavioral interventions, support the offer of an FAA behavioral assessment of Student by the NPA, and training of Student's SCIA. Parents declined to consent to the May 2011 IEP offer.

50. The evidence established that, after Parents failed to make good faith efforts to return Student to school in mid-January 2011, he did not languish in depression as Mother claimed. Student still attended his medication management appointments with CMH psychiatrist Dr. Brown, even though Parents had refused to continue mental health therapy appointments. Dr. Brown was informed that Student started an independent study program, joined a martial arts group, attended church several times a week, participated in outings with his church youth group, started drum lessons, and enjoyed outings with a friend. The record is devoid of any evidence that Parents reached out to educational, medical, psychiatric, psychological, or other therapeutic professionals during that time (except for the Stanford medical study), which one would expect if Student's depression were as severe as that described by Mother in the IEP meetings and at hearing. Dr. Chang's letter of diagnosis was not until mid-May 2011. During that same time, Parents refused to consent to the public agencies' requests for assessment, ongoing mental health therapy, or school-based supports.

*Student's Expert Witness*

51. Student's contention that the public agencies should have offered to place Student in a residential treatment facility relied in great part on the expert testimony of Brendan Pratt, Ph.D. a neuropsychologist who operates The Pratt Center in Los Altos, California. Dr. Pratt obtained bachelor's and master's degrees in psychology and obtained his Ph.D. in clinical psychology in 1997. He has been licensed in California as a psychologist for 10 years and specializes in child and adolescent psychological evaluations. Dr. Pratt has attended many IEP meetings over the years and is familiar with the legal requirements for educational placement in the least restrictive environment.

52. Dr. Pratt reviewed Student's records contained in the evidence binders of the parties in this case, including prior assessments. In addition, he met once with Parents and once with Student, but did not conduct a formal assessment of Student.[9] Dr. Pratt concluded that Student suffered from Bipolar Disorder, a medical condition in the medical Diagnostic and Statistical Manual, Fourth Edition, Text Revision (DSM-IV-TR). Dr. Pratt established that there are several types of Bipolar Disorder. The disorder, also known as manic-depressive illness, is a brain disorder or mental illness in which shifts in mood and energy range from depressive to stable to manic states, and may involve co-morbid disorders. Depression is therefore an essential component of Bipolar Disorder. For teens, Dr. Pratt established that the disorder manifests somewhat differently, with highly inconsistent grades

[9] Following Dr. Pratt's first appearance in this case on September 7, 2011, the ALJ ordered that he was prohibited thereafter from conducting an assessment of Student or contacting the public agencies until his next appearance.

and attendance, and variable moods over time. In addition, Dr. Pratt testified that Student required a residential treatment placement in order to obtain educational benefit.

53. Dr. Pratt was convinced that District and County had erred in not identifying the source of Student's Emotional Disturbance disability as Bipolar Disorder and that the error led them to conclude that Student did not require an educational placement in a residential treatment center. However, Dr. Pratt was not persuasive. Student was made eligible for special education under the educational disability category of Emotional Disturbance, and his eligibility is not at issue. Neither the IDEA or related California law recognize an educational disability called Bipolar Disorder because it is a clinical disorder. The evidence showed that overall, Student was making slow and steady progress at school, although some his annual goals were flawed and his attendance remained problematic. However, Dr. Pratt relied on Mother's descriptions that Student had not been making any progress at school and was primarily absent from school.

54. Dr. Pratt's testimony was also not persuasive because he did not speak to anyone at the District, County, or CMH who had actually worked with Student, and did not observe Student in his classes at Harbor High prior to his first appearance at hearing. Dr. Pratt also concluded that Student's behaviors at school had escalated, when that was not the case. Student's behaviors at home, however, had varied dramatically. In the school environment, the evidence showed that Student had not engaged in any violent or unsafe behavior, or suffered any school suspension, during the prior two years but Dr. Pratt was unaware of those facts. In addition, Dr. Pratt's opinions lost persuasive value because his demeanor while testifying negatively impacted his credibility as he was argumentative and inflexible in his opinions even in the face of new information. Finally, the evidence showed that Student had inconsistent and unpredictable moods. However, even if Dr. Pratt was correct that Student has a Bipolar Disorder, the evidence did not substantiate Dr. Pratt's conclusion that Student required an educational placement in a residential treatment center.

*District, County, and CMH Expert Witnesses*

*Dr. Brown*

55. The public agencies relied in part on the testimony of two psychologists from CMH. First, CMH psychiatrist Dr. Brown has been employed as a child and adolescent psychiatrist with CMH for over 12 years. He obtained his doctorate in 1992, and completed his general child and adolescent psychiatric residency training in 1997. Dr. Brown was responsible for Student's medication management services as a part of CMH's provision of AB 3632 mental health services. Student was already on prescription medications when Dr. Brown first met him in December 2007, and Dr. Brown worked with Mother and Student through the years to monitor the type and dosage of the medications.

56. Dr. Brown credibly established that he first reviewed Student's records, met with him and Parents, and did not arrive at a diagnosis for Student until April 2008. At that time he clinically diagnosed Student with Mood Disorder NOS and Anxiety Disorder NOS.

Mother criticized Dr. Brown for failing to provide her with a diagnosis at any time since 2007, but the evidence did not support her claim. Instead, she disagreed with his conclusion that Student did not have Bipolar Disorder. Dr. Brown was persuasive that, in over three years in which he had the opportunity to observe manic and depressive episodes characteristic of Bipolar Disorder, he consistently ruled it out and so informed Mother. His records corroborate his testimony.

57. Dr. Brown was persuasive that Student had not exhibited the criterion for Bipolar Disorder of a decreased need for sleep due to a manic episode. For example, Mother reported to him and testified that Student would stay up very late at night. However, he did not keep going, consistent with a manic episode, but fell asleep and then was too tired to get up and go to school. Dr. Brown was persuasive that, even if Student had Bipolar Disorder, Dr. Brown would not treat Student differently and the same medications were appropriate for him. Ultimately, Dr. Brown had a limited clinical role in Student's AB 3632 services, and did not attend his IEP team meetings or voice an opinion about appropriate educational programs.

*Dr. Sandow*

58. Dr. Meg Sandow obtained a doctor of psychology degree in 1997. She has been a licensed clinical psychologist with CMH since 2004, working with children, adolescents, and families in the CMH AB 3632 program for educationally related mental health services, including conducting assessments and attending IEP meetings. She now performs similar services under the CMH program that has replaced AB 3632: the program for Education Related Mental Health Services (ERMHS).

59. Dr. Sandow has many years of experience, including as a staff psychologist at the River Oak Center for Children in Sacramento, California, in both outpatient and residential treatment. In her position with CMH, she has worked with about 15 to 20 adolescents who had difficulty going to school and she has been successful in having them attend school without resorting to placement in a residential facility to accomplish that result, and has also placed pupils in residential facilities. Dr. Sandow established that a residential placement is an extreme choice, with potentially harmful outcomes. For example, on release from a residential facility, the pupil must deal with having missed out on significant aspects of his or her own life, including friends and jobs; has experienced abandonment and loss of love; and the placement may often result in acute hospitalizations while there, with further emotional breakdowns.

60. Due to the nature of a residential placement as a last resort in the continuum of educational placements, Dr. Sandow was more persuasive than Dr. Pratt that Student's circumstances did not require a residential placement in order to benefit from his education. She also endorsed an assessment as a precursor to residential placement.

61. Based on the foregoing, Student had not attended school since mid-January 2011 and until May 24, 2011, the public agencies had little idea what his levels of academic or emotional functioning were since he last attended, or what the sources or functions of his

behaviors were. Parents had not provided any objective medical or psychoeducational information about Student's condition to the IEP teams other than Dr. Chang's brief letter in May. Mother also declined to have Student receive any individual mental health counseling due to a dispute with CMH, discussed below. Therefore, the public agencies' proposals to assess Student, based on his sudden change of circumstances after the first of the year, were reasonable, as were the proposals to have a SCIA help him attend school, along with increased mental health counseling and behavioral intervention services. Based on the foregoing, District's and County's IEP offers in January, February and April 2011, for continued placement in the ED Program at Harbor High, with additional supports, were reasonably calculated to offer Student some educational benefit in the least restrictive environment, and did not deny him a FAPE.

*Student's BSPs*

62. Student contends that the BSPs that District and County offered in the IEPs from December 2009 through May 2011 were inappropriate and denied Student a FAPE. Beginning with the implementation of the May/November 2009 IEP in December 2009, Student's IEP contained a BSP.

63. Student's BSP was offered at the IEP team meeting on May 19, 2009, while he was still in middle school and transitioning into high school. The BSP listed significantly disruptive behaviors that Student had exhibited while in middle school. While arriving late to school and unexcused absences were mentioned, along with work avoidance, and reading a book all day, the predictor behaviors also included significant negative behaviors during the school day, such as talking back to staff, cursing, making inappropriate noises, disrupting class activities, unsafe behavior, sitting on tables/ desks, pushing over objects, and ignoring staff directives. The BSP provided that the daily behavioral point log would be taken home by Student daily, and returned signed by Parents. It also provided that Parents could set up their own reward system at home to coincide with school. The BSP generally described the behavioral system imbedded in the County ED Program: classroom points were tallied at the end of each week and a "free period' was awarded to pupils who earned 80 percent or more of their points that week. The plan provided other reinforcement procedures to use including extra free time, verbal prompts, visual redirections, and specifically for Student, no homework from school; and television or computer privileges or other reinforcers for positive behaviors at home. Student's BSP, from December 2009 to May 19, 2010, was appropriate and reasonably calculated to provide educational benefit. District had no reason to think that the BSP would not work based on the recommendations of Soquel, and Student's positive progress in the spring of 2010. Accordingly, this BSP did not deny Student a FAPE.

64. Thereafter, on May 19, 2010, District and County offered the BSP in connection with Student's annual offer, and the BSP was substantially similar to the May 2009 BSP. By that time, however, District and County had more than five months under Student's last operative IEP and BSP. The evidence established that this BSP was not appropriate because it still described significant negative behaviors at school that Student had

not engaged in since middle school. As found above, Student had made some progress and the BSP failed to adjust for that progress as to his school-based behaviors.

65. In addition, the BSP did not address Student's continued absences and tardy arrivals. Although he had made some progress toward increased attendance, the BSP did not support Student's Annual Goals 4 and 5, which were not measurable and were inappropriate in any event. For example, most of the recommended plans in the BSP to remove Student's need to use those behaviors had to do with school-based accommodations, and a daily behavioral point log connected to consequences and rewards, and did not have much to do with getting him to school in the first place, except for the incentive of increased points. Accordingly, the BSP in the May 2010 IEP was not appropriate and denied Student a FAPE. The public agencies should have offered increased behavioral interventions aimed at helping Student attend school and failed to do so. The May 2010 BSP was therefore inappropriate and denied Student a FAPE.

66. Although the public agencies did not offer to revise the BSP in the January, February, or April 2011 IEPs, they offered an FAA to thoroughly assess Student's behavioral needs with respect to his reported avoidance of school beginning in January 2011; Student had stopped going to school; the public agencies offered HHI services temporarily but never received the requisite physician's note; and when Student returned to school in early May 2011, it was with different, direct behavioral interventions in place, including a trained, supervised SCIA from Easter Seals, and increased mental health supports. Subsequently, at the May 2011 IEPs, District and County offered to provide additional direct behavioral interventions with a trained behavior specialist and a revised BSP. The May 2011 BSP identified Student's only negative targeted behaviors as arriving late to school and a high percentage of absences. The BSP identified Student's need for intensive interventions to help him get to school in the morning and was appropriate to meet his behavioral needs.

67. The evidence established that, after January 20, 2011, Parents did not cooperate with District and County to ensure Student's attendance at school. Had Student attended, the inappropriate BSP dated May 19, 2010 would have remained in effect as a stay put service until Parents consented to the SCIA behavior intervention offer on April 15, 2011. However, since Student did not attend, no additional denial of FAPE based on the BSP is found for the period from January through May 2011.

*Mental Health Services*

68. Student contends that District's, County's, and CMH's offers for educationally related mental health services in the IEPs from December 2009 through May 2011 were inappropriate and denied Student a FAPE. The public agencies contend that the mental health service offers were appropriate. In addition, CMH contends that it was not responsible for mental health services for the 2010-2011 school year.

*2009-2010 School Year*

69. As of December 2009, Student's IEP offered individual AB 3632 counseling services once a week for 50 minutes; family therapy twice monthly for 50 minutes per session; and group counseling and guidance once a week for 50 minutes. This frequency of services was designed to support Student on a weekly basis.

70. In October 2009, CMH conducted a mental health school assessment of Student, as found above. CMH mental health therapist Vince Stroth, who had worked with Student since May 2008, established that Student's behaviors and focus had improved, and that Student's primary problem was still his sporadic attendance and conflicts with Parents. Mr. Stroth recommended continued mental health services consistent with the frequency and duration of the services set forth in the May 2009 IEP. Mr. Stroth testified persuasively that Student's related mental health services did not need to be increased at that time. [10]

71. In connection with the May 2010 IEP team meeting, District, County, and CMH offered similar mental health services, supported by both Mr. Stroth's mental health assessment and Ms. Cabanillas' May 2010 triennial psychoeducational assessment.

*Governor's Veto of Chapter 26.5 Mental Health Funding*

72. As determined in Legal Conclusions 5 through 28, on October 8, 2010, California Governor Schwarzenegger vetoed a legislative funding appropriation for Chapter 26.5 or AB 3532 mental health services and announced that the mandate to comply with Chapter 25.6 was suspended. An appellate court later held that these actions relieved local county mental health agencies of the obligation to implement Chapter 26.5 services. At the time of Student's subsequent IEP meetings in January through May 2011, however, there was apparently no discussion of the Governor's recent actions or their impact, if any, on Student's services.

73. CMH Program Manager Kathy Cytron has been with CMH for 19 years, the last 12 of which she has served as its Program Manager and has supervised staff who provided mental health services to Student and Parents under his IEPs. Ms. Cytron established at hearing that, subsequent to the former Governor's veto of the funding for educationally related mental health services under Chapter 26.5, CMH entered into a contract with County to continue to provide outpatient related mental health services to the school districts within the NCSC SELPA, including District. That contract expired on June 30, 2011, and as of the hearing, no new contract had been finalized. Between late October 2010 and June 30, 2011, Ms. Cytron established that there was no contract or protocol in place regarding residential treatment placements for adolescents. She was persuasive, however, that CMH cooperated with school districts during that time period depending on their needs, and continued providing services.

[10] However, Mr. Stroth also recommended to refer the family to CMH Family Support Team for additional supports in the home "to help relieve immediate stress" in the home environment, and not as an educationally related service under AB 3632.

*2010-2011 School Year*

74. For the fall of Student's 2010-2011 school year in 10th grade, the evidence did not establish that Student required more intensive mental health services to support his receipt of educational benefit at that time. After mid-January 2011, when the public agencies were notified by Parents that Student's circumstances had significantly changed, the January 20, 2011 IEP team responded appropriately to offer increased mental health therapy services in order to meet Student's needs, along with a related FAA assessment and Parents declined the offer. There was no mention of any change in the law or the relationships among the parties.

75. At the time of the April 13, 2011 IEP, Parents still insisted on a residential treatment placement, and in view of Student's apparent refusal to attend school, the public agencies made an appropriate determination to offer significantly increased mental health supports since Student was at risk of an out-of-home placement as follows: individual AB 3632 mental health counseling four times a month for 75 minutes per session; increased family therapy four times a month for 50 minutes a session; and 1000 minutes per year of additional AB 3632 group counseling and guidance. Parents' purported acceptance of the mental health services in their April 15, 2011 attachment to that IEP was legally a counter offer containing additional conditions, to require CMH therapists to agree to implement Student's "full day" of school.

76 The May 24, 2011 IEP again offered significantly increased individual AB 3632 mental health counseling four times a month for 75 minutes per session; and family therapy four times a month for 50 minutes a session; but increased the additional AB 3632 group counseling and guidance from 1000 minutes a year to 1800 minutes a year, listed as "generally 50 minutes per week year round services (including ESY)." Student did not present sufficient evidence to sustain his burden that the offers for increased mental health supports were inappropriate. As found above, Dr. Pratt's opinion that a residential treatment placement was required for Student was not persuasive.

77. Based on the foregoing, Student's IEPs for both school years consistently offered appropriate related mental health services for individual, family, and group counseling and guidance, and did not deny him a FAPE. Even if more related mental health counseling would have been of benefit to the family, an offer of more therapy was not required to provide Student with educational benefit. The evidence established that Parents were critical of District's, County's, and CMH's IEP offers for a long time because they saw that Student still had a disability that impeded his access to education, and were frustrated that he had not made better progress. There is no doubt that Parents love Student and want the best for him. However, their desire to see Student able to fully participate in school all day long every day, and do well in his academic subjects, led to their impatience, and their inability or unwillingness to see that Student was actually making progress. Instead, Parents wanted the public agencies to make Student adhere to a standard school schedule or suffer the consequences. Parents were justifiably frustrated because, as found herein, Student's attendance and tardiness goals and his BSP were inappropriate and denied him a FAPE. But

those substantive defects in behavioral interventions for Student were not capable of appropriate resolution by adding more therapeutic counseling.

78. However, school staff and CMH therapists who testified were persuasive that Parents were inconsistent in their follow through to implement recommended positive reinforcers for Student in the home. In addition, the evidence demonstrated that Parents' primary motivation for requesting a residential placement was related to issues in the home environment, and not related to Student's learning per se. For example, Student's SCIA noticed holes punched in a wall in the home and Mother admitted at hearing that Student, who is a large young man, engaged in angry and physically aggressive behaviors at home. The CMH records indicate episodes of family arguments with Student's siblings and Parents. Parents contend that if Student attended school more, these behaviors would occur at school as well. However, the evidence demonstrated that Student had steadily improved his behaviors at school since 2007, when he was physically violent and aggressive at school. Student's consistent improvement in school behaviors was documented by the progress reports of his teachers.

79. Based on the foregoing, District's, County's, and CMH's offers of related mental health services were reasonably calculated to provide educational benefit and did not deny Student a FAPE.

*Transition Plan and Transition Goals and Services*

80. Student contends that, beginning with the May 19, 2010 IEP, the individual transition plans (ITPs) that District and County offered in his IEPs, and the transition services offered in those plans, were inappropriate and did not comply with the law. District and County contend that the ITPs were appropriate.

81. Beginning not later than the IEP in effect when a pupil becomes 16 years of age (or younger if appropriate), his or her IEP must have postsecondary goals related to training, education, employment, and where appropriate, independent living skills, and must have transition services needed to assist the pupil in reaching the postsecondary goals. Thereafter, the ITP's shall be updated annually. Transition services for high school pupils are an essential component of a FAPE, and include instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and acquisition of daily living skills. The failure to properly formulate a transition plan may be a procedural violation of the IDEA that warrants relief upon a showing of a loss of educational opportunity or a denial of a FAPE.

82. Student became 16 years of age in October 2010. The evidence established that, as required by law, the May 19, 2010 IEP offered a transition plan in order to meet the requirement for the ITP to be in place by Student's 16th birthday. Accordingly, the ITP was timely.

83. Student criticized the May 2010 ITP because it identified Student's interests at that time as wanting to be a Marine or a computer software engineer. That criticism was misplaced because the record consistently established that those areas were two of Student's preferred career interests, and the law required the ITP to take his interests into consideration. However, Student established that the May 2010 ITP was otherwise in violation of the law. The brief ITP did not contain any measurable postsecondary goals in the area of education or training, employment, or independent living. In addition, the ITP did not contain any annual transition activities during the term of the ITP to help him progress toward any goals. It merely provided that Student intended to participate in the high school curriculum leading to a diploma, instead of an alternate certificate of completion. District failed to revise the ITP so it would comply with law when Student became 16 years of age. Therefore the May 2010 ITP violated the law and constituted a procedural violation.

84. In contrast, the ITPs offered in connection with Student's IEP on January 20, 2011, and thereafter, contained postsecondary goals in the areas of education, employment, and independent living, and contained transition services or activities to support those goals. In addition, Student's goals for both attendance at a junior college and postsecondary employment were supported by his participation in the workability program where Student received on-the-job training and learned to perform work in a reliable and responsible manner. Beginning in January 2011, Student's ITP complied with the law and was appropriate.

85. Sally Ann Beck, County's work experience specialist, credibly established that the workability program supported both vocational education and transition to postsecondary life. In the fall of 2010, she had worked diligently with Student to facilitate his workability program and was persuasive that Student was motivated to come to school in large part due to his on-the-job training class. In October or November of 2010, Student began working at Blockbuster, a retail video store, and then, through Ms. Beck's efforts, he obtained a job at GameStop, a retail store selling electronic computer games. Student's interest in computers led to be successful in the positions. He had personable, work ready skills, and his school attendance increased.

86. Thus, while Student's ITP was not in compliance with the law for a period of about 8 months between May 2010 and January 2011, Student did not establish that the procedural violation denied him a FAPE because, during that time, robust transition and workability services were implemented, from which Student benefited. Accordingly, the violation was harmless error and did not deny Student a FAPE.

87. After Student returned to school in early May 2011, he again resumed both vocational training jobs but informed Ms. Beck that he only wanted to work at GameStop and wanted to focus on academics instead of the second job. In connection with Student's May 24, 2011 IEP team meeting, which Student did not attend, Ms. Beck described Student's workability jobs and informed the team that Student was motivated by the GameStop job to attend school more (because if he did not attend school he could not go to the job/class). Mother expressed concerns both with Student's deficiency in school credits for graduation,

and the amount of time the workability program took. Ms. Beck assured Mother that Student would only work at GameStop twice a week for one hour each time. The team discussed how the job could be used as a reward to support Student's progress. In addition, Ms. Beck informed the team that her work with Student on his career interest survey and another questionnaire about the future had also motivated Student to work more on his academics.

88. The evidence established that after the IEP meeting, Mother informed Student that he would have to terminate his job in order to focus on academics. Ms. Beck established that when Student learned his Mother would not permit him to continue to work at GameStop, he expressed his unhappiness to Ms. Beck and appeared sad, depressed, and embarrassed, as he knew she had supported his obtaining the position. Student's SCIA also credibly testified that after Student had to quit the job, he became frustrated, shut down, and did not return to school until the extended school year summer program. Thus, any deficiency in Student's transition services after he returned to school was not due to a defect in the operative ITP, but due to Parents' actions in unilaterally removing job training and Student's primary motivation to attend school.

*Failure to Implement IEP Components*

89. Student contends that, beginning in December 2009, the public agencies denied him a FAPE because they failed to implement his operative IEPs for the 2009-2010 school year in ninth grade, 2010-2011 school year in 10th grade through May 30, 2011. Student contends that the public agencies materially failed to implement five discreet components of his operative IEPs, as follows: a) direct specialized instruction for 360 minutes daily; (b) specified annual IEP goals; (c) accurate reporting to Parents of Student's academic progress, attendance, and behavior data; (d) his BSP; and (e) mental health counseling and guidance services.

90. A failure to implement a provision of an IEP may amount to a FAPE violation only where the failure has been determined to be material. A material deviation from an IEP occurs when the program or services provided to the pupil fall significantly short of those required by his or her IEP, without a showing of educational harm.

*360 Minutes of Daily Instruction*

91. Student contends that District and County failed to provide him with 360 minutes per school day of specialized academic instruction in the County's ED Program, because they did not assist him to overcome behaviors that impeded his ability to get up in the morning, get dressed, and go to school on time, and should have imposed strict consequences to mold his behaviors. However, Student's claim that the agencies should have offered different or further services to work on his attendance problems does not prove that they failed to implement his IEP provisions for specialized instruction.

92. The evidence established that Student's instructional classes in the ED program were available to him at all times from December 2009 through May 2011.

Therefore, the agencies did not fail to implement his specialized instruction. Student historically had school attendance problems. He had 114 absences and tardies for the 2006-2007 school year in seventh grade. Beginning in December 2009, District and County agreed to accommodate Student's tardiness, while other supports, including annual goals and mental health services, were provided to help Student make better choices about school attendance. Rather than reflect a "tardy" on Student's formal attendance records, the parties agreed to his tardy arrival as a special education accommodation due to his disability, without punitive consequences. Implicit in that understanding was that there would be occasions when a tardy arrival would be significant enough to warrant consequences.

93. Overall, Student's claim that District and County failed to implement his specialized academic instruction is not supported by the evidence. Rather, Student's teachers were ready and willing to, and did teach him. Moreover, Student's jobs at Blockbuster and GameStop were part of District's workability program and counted as classroom credits for learning vocational skills and Student's claim that they were not instructional classes was not sustained. Consequently, the public agencies did not fail to implement specialized academic instruction required by Student's IEPs and did not deny him a FAPE on that basis.

*Annual IEP Goals*

94. Student contends that the public agencies failed to implement his annual IEP goals in his operative IEPs from December 2009 through May 2011, by failing to accurately report data to Parents about Student's attendance, academic progress, and behaviors. To sustain this claim, Student must establish that any deviations from implementing his IEP goals were material. Student claims that his annual IEP goals were not implemented because they were identical to his May 2008 annual goals, and he regressed and did not make any progress on them. Student's claim that the agencies failed to implement his goals is separate from his claim that the annual goals were not drafted appropriately, and must meet a different legal standard. While a lack of progress may be probative of whether a shortfall in services was minor or material, it does not in and of itself establish the shortfall in services to begin with.

95. The evidence established that District and County implemented Student's annual goals from December 2009 through May 2011, to the extent that Student attended school. Student's County ED Program teacher, Mr. Simpkins, testified credibly that he regularly worked with Student on his goals. Overall, the evidence did not support Student's contention that District and County failed to implement Student's annual mental health, academic, and behavioral goals, and he was not denied a FAPE on that basis.

*Accurate Data Reporting to Parents*

96. Student contends that the public agencies failed to implement his operative IEPs by failing to accurately report data to Parents about Student's attendance, academic progress, and behavior, which denied Student a FAPE. This claim is distinct from his procedural claim that the public agencies violated the law by significantly impeding Parents'

opportunity to participate in the IEP process, based on the same failures to accurately report data to them. Here, the focus of the claim is whether the agencies materially failed to implement the IEPs.

97. District and County were obligated by law to keep track of Student's attendance. As found above, the evidence established that Student's operative IEPs contained two annual goals for attending school and coming to school on time. Student's IEPs provided that District and County would measure Student's Goal 4, for him to "arrive at school on time" and that the method of measuring progress on this goal would be the attendance records. For Goal 5, to work on Student attending school in relation to his anger triggers, the goal provided that it would be measured by the behavior data collection system. As found above, the goals were not measurable, not because of an absence of data, but because of the absence of a baseline level of performance from which to measure any progress. That defect goes to the appropriateness of the goal. In addition, Student's IEPs indicated that Parents would be informed of Student's academic progress every trimester.

98. Student asserts that District and County failed to implement IEP requirements to use attendance and behavioral data records to provide Parents with accurate information about how often Student missed school and how often he was tardy. However, the IEPs required the agencies to use the attendance and behavioral data records to measure progress and did not require them to deliver detailed data to Parents. Student's claim that there was no attendance data kept by class period was also incorrect. At the IEP meetings, the public agency personnel reported generally to the IEP teams, including Parents, about Student's academic progress and progress on the goals. For example, Mr. Simpkins testified credibly that he informed the IEP teams that Student was making slow steady progress in attending school. His representations to the IEP teams were based on his observations and on the data complied, were credible, and truthful. Staff called Parents when Student was absent and Parents knew when he was tardy or absent because he was at home at those times.

99. Student was critical of District's and County's reports of academic progress, as reported by his teachers at IEP meetings, and in his report cards or grade transcripts. However, his claim that District and County did not provide accurate reports of his grades or changed his grades was not supported by the evidence. While Parents were provided with a copy of Student's transcript that reflected incorrect data, that data was not up to date, and that mistake did not amount to a material failure to implement his IEP. There was also no evidence that District and County were required by Student's IEPs to deliver to Parents written measurement data for his IEP goals. Based on the foregoing, District and County did not materially fail to implement Student's IEPs by failing to accurately report data to Parents. Accordingly, Student was not denied a FAPE on that basis.

*Student's BSPs*

100. Student contends that the public agencies failed to implement his operative IEPs by failing to implement his BSP from December 2009 through May 2011. As found above, beginning in December 2009, Student's IEPs contained a BSP. Student did not

sustain his burden of proof to establish that District and County failed to implement his BSP. Student's closing argument contends that District's BSP should have been revised. However, that contention is relevant to Student's claim that the BSP offers were not appropriate, and is not relevant to the question whether District and County failed to implement the BSP in some material way. Accordingly, there is no evidence that District and County materially deviated from Student's BSPs in his operative IEPs when Student attended school, and they did not deny Student a FAPE on that basis.

*Mental Health Counseling and Guidance Services*

101. Student contends that District, County, and CMH failed to implement his operative IEPs by failing to implement his related mental health counseling services from December 2009 through May 2011. As found above, the mental health services that the public agencies offered to Student during that time period were appropriate to meet his educational needs, and were increased as his needs changed after mid-January 2011. To the extent that Parents consented to the mental health services, there is no evidence that the public agencies failed to provide the services. For example, during the hearing Student claimed that Mr. Beito, Student's mental health therapist from the fall of 2009 to about late January 2011, failed to provide individual counseling to Student in the fall of 2010. However, the evidence established that Student declined to meet with Mr. Beito on many occasions that fall. In January 2011, Mother complained to CMH that Mr. Beito had been "out of compliance" in counseling Student for over a year. However, Parents had not complained to CMH about any alleged failure of Mr. Beito to perform his job and provide counseling to the family prior to January 2011, when he disagreed with their request for residential placement.

102. At the January 20, 2011, IEP team meeting, Mother informed the IEP team that she believed Student's educational placement should be changed to a residential treatment center, where he could be in a full time, 24-hour therapeutic environment due to what she believed to be his deteriorating emotional condition. Thereafter, based on a dispute with CMH, as found below, Mother declined to permit Student to receive individual therapy, and Parents also declined to participate in family therapy because Mother disagreed with how the therapists were communicating with Student and asserted that Parents had lost trust in them to support Student's IEPs.

103. Based on the foregoing, the evidence did not support Student's claim that CMH failed to deliver the mental health counseling services required by Student's operative IEPs. Even when Parents purported to agree to therapy from CMH in April 2011, they conditioned their continued participation on additional demands, and did not intend to actually receive the therapeutic services. Accordingly, the public agencies did not fail to implement Student's mental health services and did not deny him a FAPE on that basis.

*Lack of Appropriate CMH Mental Health Services*

104. For the period from December 2009 through May 2011, and/or to the present, in addition to the above claims, Student contends that CMH denied him a FAPE because: (a) it failed to provide mental health services in a safe and effective manner; (b) failed to have a psychiatrist and therapist who accurately diagnosed Student and accurately reported the findings; and/or (c) significantly impeded Parents' opportunity to participate in the IEP decision-making process by failing to provide documents to Student in a timely manner and free of cost; and/or by failing to properly investigate and intervene when the mental health therapist acted outside the scope of Student's IEPs, and emotionally preyed on Student.

*Inaccurate Diagnoses*

105. Student argues generally that CMH staff misdiagnosed him and that he should have been clinically diagnosed with a Bipolar Disorder. As found above, that medical diagnosis was not established by the evidence because Dr. Brown's testimony was more credible than Dr. Pratt's. Even if true, such a diagnosis would not have changed the manner in which Dr. Brown monitored Student's medications, or in which the CMH therapists provided therapeutic counseling to Student and Parents based on the mental health and behavioral needs of the family. In addition, the fact that Dr. Brown did not have some of his notes of appointments with Student transcribed until many months later does not prove that the notes were timely made in the normal course of his psychiatric practice or that he altered information. The evidence therefore did not establish that CMH staff misdiagnosed Student or inaccurately reported diagnostic findings.

*Delivery of Mental Health Documents*

106. Student claims that CMH denied Student a FAPE by failing to timely deliver Student's school-related mental health records to Parents promptly upon their email request for records in February 2011, in violation of the law. Parents claimed they needed to review the records at no cost prior to the expanded IEP team meeting on February 23, 2011, and that their rights to participate in the IEP process were therefore significantly impeded. CMH contends that the requested records were not school records.

107. Due process hearing rights include the right and opportunity of parents to inspect and make copies of their child's school records within five business days of the request, and without unnecessary delay prior to an IEP meeting.[11]

108. In an email dated January 26, 2011, addressed to CMH staff, Parents requested "a record of services, for County Mental Health, from September 2010 through the present." Thereafter, immediate and ongoing correspondence between Parents and CMH established that CMH asserted confidentiality of Student's mental health records under the Health

[11] See Education Code section 56504. The law also provides that the agency may charge for the actual costs of the request unless the costs effectively prevent the parents from obtaining the records, in which case the copies should be provided at no cost. Student did not present any evidence that Parents could not afford to pay for the copies.

Insurance Portability and Accountability Act (HIPPA) and Welfare and Institutions Code and requested that Parents sign a release of information authorization. On February 18, 2011, Student requested a more extensive list of documents and CMH sent another authorization form. CMH charged Parents for the copy costs and Parents objected.

109. On March 9, 2011, Parents filed a compliance complaint with the California Department of Education (CDE) to compel production of the records without cost. On April 29, 2011, CDE ordered the California Department of Mental Health, and not CMH, to produce the documents at no cost as educational records under Education Code section 56504.[12] Mother's testimony did not establish that the lack of the records before the February 23, 2011 IEP meeting resulted in prejudice to Student at that meeting, where Mother continued to insist on a residential placement. Mother established that she received most, but not all of the requested records prior to the May 24, 2011 IEP team meeting, and received the rest prior to the hearing. Accordingly, assuming that CMH committed a procedural violation by not delivering the records before the February 2011 IEP meeting, Student did not establish harm, by any significant impediment to either Parents' participation, or Student's receipt of a FAPE, and the violation did not deny him a FAPE.

*Unsafe and Improper Conduct by Mental Health Therapist*

110. Student next contends that CMH mental health therapist Alan Friedman engaged in inappropriate conduct and discussions with Student in March 2011, which CMH failed to properly investigate and intervene, and that Mr. Friedman acted outside the scope of Student's IEPs, and emotionally preyed on him.

111. Student cites no legal authority for the proposition that this issue is within the jurisdiction of OAH to adjudicate. OAH has no jurisdiction over personnel matters or the authority to order the requested relief to order CMH to investigate Mr. Friedman's conduct or order his "removal." As a public agency, CMH is bound by legal requirements regarding claims of malfeasance, negligence or other improper conduct against its employees that are beyond the scope of this tribunal. As such, Student's claim is not within OAH's jurisdiction.

112. Second, to the extent Student argues that Mr. Friedman's conduct in speaking confidentially to Student in the context of mental health therapy appointments, or CMH's response to it, constituted a procedural or substantive violation of special education law, which denied him a FAPE, the evidence does not support the contention. This claim is based solely on the testimony of Mother, as Student did not testify. Mother's version of what Student told her that Mr. Friedman told Student was not a "transcript" as Mother testified,

[12] CDE'S compliance order and finding of a violation of law is not dispositive of the issue in the present case. CDE conducts limited investigations, has 60 days to investigate and issue a report regarding technical compliance, and does not have jurisdiction to determine whether any violation may result in a denial of a FAPE. (See Cal. Code Regs., tit. 5, § 4600, et seq.)

but a purported "summary" of Student's explanations to Parents, in response to their interrogation of him over a period of days. Special education law prohibits the use of hearsay, including double hearsay, as the sole basis upon which to render findings of fact.[13] In addition, while Mother established that she did not get along with Mr. Friedman, her desire to control the content of her son's mental health therapy undermined her credibility.

113. In contrast, Mr. Friedman was a credible and candid witness, his testimony was more persuasive than Mother's, and was corroborated by his contemporaneous written notes to CMH. In late January 2011, Mr. Friedman was assigned as Student's therapist after Mother declined to continue working with Mr. Bieto, because he disagreed with her decision to seek a residential treatment placement for Student. As found above, Mr. Friedman had worked with Student in the ED Program and in AB 3632 group therapy during 2010. Mr. Friedman established that he tried to meet with Student, but Mother blocked his efforts and did not make Student available. In late February 2011, Mr. Friedman finally met with Student individually and established a good rapport with him. Mr. Friedman dealt with balancing Parents' desire to meet with Mr. Friedman separately and his goal not to alienate Student, who was 16 years old, and to fully include him in his therapy. However, this tension and the gist of the dispute between Parents and Mr. Friedman, centered on whether CMH, or Parents, were in charge of Student's mental health therapy services. It was exemplified in an email communication from Student's attorney to the District on March 3, 2011, in which Student's attorney relayed Parents' complaint that Mr. Friedman should not have spoken to Student about his options for completing his education, and independent home study in particular. Parents requested that CMH instruct Mr. Friedman not to engage in such subjects with Student and claimed it was in violation of his IEP requirements for a full day of educational instruction.

114. Mother claimed that CMH was somehow prohibited by Student's IEPs from discussing with Student the educational options available to him as he explored preparing for postsecondary life. This position was in stark contrast to previous IEP meetings where Student had been an active participant and encouraged to voice his preferences and interests, and to make his own commitments to progress in his programs. It was also in conflict with Parents' claim that Student's ITPs were not appropriately helping him plan for postsecondary life, which involves independent living skills such as weighing choices. The evidence did not support Mother's claim that the IEP team or CMH therapists were prohibited from discussing Student's options with him. In addition, individual mental health therapy necessarily involved confidential communications between the therapist and the client. Moreover, Parents' insistence that Student's return to school in the spring of 2011 had to be for full-day attendance and adherence to academic schedules was unrealistic. It did not take into consideration that Student had already accomplished significant progress since middle school, and minimized the extent to which his disability, even if accompanied by a Bipolar Disorder, required patience and positive reinforcements. In addition, Parents' position devalued Student's preference for vocational workability training.

[13] See California Code of Regulations, title 5, section 3082, subd. (b).

115. As to a particular incident on March 10, 2011, Mr. Friedman was persuasive that he had an individual therapy appointment with Student and had agreed to meet him at home. Mother again wanted to speak with Mr. Friedman privately before he met with Student, Mr. Friedman again tried to avoid alienating Student, and Mother interpreted his reluctance as disrespectful and divisive, and the ensuing miscommunications and accusations followed. Mr. Friedman was authorized to speak confidentially with his client, and credibly denied Mother's accusations that he spoke disparagingly of her to Student. However, Mr. Friedman candidly and persuasively testified that he asked Student what he knew about the educational placements that Parents were considering for him, and that, as Student's therapist, it was his responsibility to activate Student's internal motivations and empower him to make personal choices about his IEP preferences at the age of 16. As found above, the evidence was insufficient to support Student's claim that Mr. Friedman's actions somehow denied him a FAPE. Based on the foregoing, CMH did not deny Student a FAPE on that basis.

*District's Right to Assess*

116. District contends that it has the right to assess Student in the specified areas related to his disabilities set forth in the April 15, 2011 assessment plan without parental consent. Student contends that District had no right to conduct assessments because Student had just had a triennial assessment in May 2010, less than a year previously. In addition, Student argues that any mental health assessment had to come from CMH under AB 3632.

117. An LEA is obligated to reassess a pupil's eligibility at least once every three years, and may reassess the pupil not more frequently than once a year, unless the parent and the LEA agree otherwise. The LEA is also obligated by law to reassess when it determines that the educational or related services needs of the pupil warrant reassessment. The parent has at least 15 days from receipt of the proposed assessment plan to arrive at a decision.

118. As found above, between January and April 2011, District and County convened multiple IEP team meetings in an effort to find out what had happened to Student and why he was not attending school. The IEP offers to assess Student were warranted by new and alarming information from Parents that Student had succumbed to a deep depression and refused to attend school. Therefore, District reasonably determined that Student's significantly changed circumstances warranted reassessment, and District was not required to wait a full year until May 2011 in order to address the changes.

119. Consistent with the IEP offers to assess Student made at the February 23, 2011, and April 13, IEP meetings, District's Director of Special Education Lynette Seibel emailed a proposed assessment plan to Parents on April 19, 2011, along with the April 13 IEP. She also mailed a copy of the assessment plan to Parents via U.S. mail. Thus, even if District had been required to wait a year, the assessment plan itself was not the assessment. Since Parents were entitled to time to respond to the plan, by the time the assessment actually began, a year would probably have passed.

120. District's assessment plan, dated April 15, 2011, proposed to assess Student in two areas. First, District proposed a social-emotional assessment, to be conducted by a CMH therapist and/or a school psychologist. Second, District proposed an FAA to address Student's attendance behaviors, to be conducted by a behavioral specialist contracted directly through the District, or a district behavior inclusion specialist.

121. District's proposal for both assessments was based on Student's sudden change of circumstances beginning in mid-January 2011, in which he had inexplicably stopped attending school. The assessment was therefore reasonable and District was obligated to offer it in the circumstances where Parents were refusing other alternatives and requesting a residential placement. It was appropriate for District to request to assess Student in order to determine what new or different services to offer him, and to understand the antecedents, behaviors, and consequences of behaviors reported to them by Parents.

122. The FAA would be conducted by Heather Pint, an experienced behavior specialist with an NPA. Ms. Pint obtained a bachelor's degree in psychology in 2003, and is currently working on her master's degree. She has been employed by Easter Seals for over 10 years and has training, education, and experience in the principles of applied behavior analysis, primarily with youths with autism or emotional disturbance, and is knowledgeable about reinforcement and motivational interventions. Ms. Pint established that, as a board certified behavioral analyst (BCBA) trainee, she has prior experience performing FAAs under the supervision of a BCBA and is qualified conduct Student's FAA on that basis, using appropriate assessment tools and observations. Ms. Pint has already met and worked briefly with Student in the home with his SCIA, and established a working relationship with him.

123. District was entitled to select a qualified school psychologist to conduct the assessment. The District's psychological social-emotional assessment would be done by CMH psychologist Dr. Sandow, who established that she is well qualified to conduct that assessment using appropriate assessment tools and observations. Both assessments were therefore proposed to be conducted by qualified professionals consistent with the law. Student did not establish that District did not have the legal right to offer a social-emotional assessment. The plan's alternative proposal for a CMH therapist would not have been appropriate, but did not invalidate the plan, since Dr. Sandow was qualified and agreed to conduct the assessment. Based on the foregoing, the District's assessment plan of April 15, 2011 complied with the law.

*Remedies and Compensatory Education*

124. An ALJ has broad discretion to remedy a denial of FAPE and may, among other things, order a school district to provide compensatory education or additional services the pupil involved. Any such award must be based on a highly individualized determination.

125. As set forth in Factual Findings 14 through 25, some of Student's annual goals were immeasurable and inappropriate to meet his needs related to his disability. Specifically, Student's Goal 1 for academic written expression was immeasurable and inappropriate for a

year and a half from December 2009 through May 2011. In addition, Student's Goals 4 and 5, to arrive at school timely, and to attend school, were also inappropriate as there were no baselines from which to measure progress, and they were otherwise inappropriate to support the intended behaviors, even with the BSP. Those goals were also corrected by May 2011. Consequently, Student was denied a FAPE and is entitled to relief.

126. Although Student's closing argument only requested a residential treatment placement, Student's complaint also requested compensatory education in the form of mental health therapy and academic instruction. However, compelling evidence established that Parents permitted Student to avoid school from mid-January to the end of April, 2011, by refusing to cooperate with the public agencies to accept interventions to bring Student to school and to assess the true nature of his problems. By refusing to cooperate during that time period, three months should be subtracted from the award. As a result, Student was denied a FAPE for about 13 months. All three goals were material to his educational progress. Student lost opportunities to improve his written expression and the inappropriate attendance and tardiness goals negatively impacted his access to his education. Even though there was evidence that the goals were implemented and worked on, their basic inappropriateness and lack of measurement diminished their usefulness. Assuming a 40 week school year, and in the absence of any other proposed method of calculation, Student should be compensated at the rate of two hours per week for the academic goal and the same for the combined behavioral goals. Based on the foregoing, District and County shall provide Student with compensatory education in the form of 80 hours of individual academic instruction by a qualified and credentialed special education teacher. In addition, District and County shall provide Student with compensatory education in the form of 80 hours of additional behavioral intervention services by a qualified behavior specialist, in conjunction with the relief ordered below.

127. As set forth in Factual Findings 62 through 67, District's and County's BSP for Student was inappropriate and denied him a FAPE from May 19, 2010 to the end of April 2011. However, after January 20, 2011, Student had stopped attending school, and there is no evidence that a revised BSP would have occasioned his return to school prior to the beginning of May 2011, when the SCIA services were implemented, and that time period is therefore excluded. Student was therefore denied a FAPE as to the BSP for about eight months, and is entitled to relief. In the absence of any other proposed method of calculation, Student should be compensated at the rate of two hours per week for the inappropriate BSP, or 80 hours, plus the 80 hours ordered above based on the inappropriate behavioral goals. District and County shall therefore provide Student with compensatory education in the form of 160 hours of additional direct behavioral intervention services by a qualified behavior specialist. These hours include hours for supervision, consultation, and any related parental and school staff training.

## LEGAL CONCLUSIONS

1. Each party requesting relief has the burden of proof in this proceeding as to his issues. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].) The issues in a due process hearing are limited to those identified in the written due process complaint. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).)

*FAPE and Related Services*

2. A pupil with a disability has the right to a FAPE under the IDEA, consisting of special education and related services. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, §§ 56000, 56026.) FAPE is defined as special education, and related services, that are available to the pupil at no cost to the parent or guardian, that meet the state educational standards, and that conform to the pupil's IEP. (20 U.S.C. § 1401(9); Ed. Code, § 56031; Cal. Code Regs., tit. 5 § 3001, subd. (o).) A child's unique educational needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.)

3. The term "related services" (designated instruction and services in California) includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.) Related services must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd. (a).) An educational agency satisfies the FAPE standard by providing adequate related services such that the child can take advantage of educational opportunities. (*Park v. Anaheim Union High School* (9th Cir. 2006) 464 F.3d 1025, 1033.) Related services may include counseling and guidance services, and psychological services other than assessment. (Ed. Code § 56363, subd. (b)(9) and (10).)

*Continuum of Services*

4. Education Code section 56360 requires that the special education local plan area (SELPA) must ensure that a continuum of alternative programs is available to meet the needs of individuals with exceptional needs for special education and related services. (34 C.F.R. § 300.115(a) (2006); Ed. Code, § 56360.) This continuum must include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. (34 C.F.R. § 300.115(b)(1) (2006); see also Ed. Code, §§ 56360, 56361.) If placement in a public *or private residential program is* necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parent of the child. (34 C.F.R. § 300.104.)

*Public Agencies*

5. Special education due process hearing procedures extend to "the public agency *involved in any decisions regarding a pupil*." (Ed. Code, § 56501, subd. (a); emphasis

added.) In California, the determination of which agency is responsible to provide education to a particular pupil is, in most instances, governed by residency requirements as set forth in sections 48200 and 48204 of the Education Code. (*Katz v. Los Gatos-Saratoga Joint Union High School Dist.* (2004) 117 Cal.App.4th 47, 57; *Orange County Dept. of Educ. v. A.S.* (C.D. Cal. 2008) 567 F.Supp.2d 1165, 1167.) An LEA is generally responsible for providing a FAPE to pupils with disabilities who reside within the LEA's jurisdiction. (20 U.S.C. § 1414(d)(2)(A); Ed. Code, § 48200.)

6. California is divided into 58 political county subdivisions. (Cal. Const. Art. 11, § 1(a).) The County of Santa Cruz functions, as all counties do, to provide municipal services to its residents, and to act as a delivery channel for state services, such as public health care, child welfare, and foster care. For purposes of special education, Education Code section 56028.5 provides that:

> "Public Agency" means a school district, *county office of education*, special education local plan area, a nonprofit public charter school ...[as specified]..., *or any other public agency* under the auspices of the state or any political subdivision of the state *providing special education or related services to individuals with exceptional needs*. For purposes of this part, "public agency," means all of the public agencies listed in Section 300.33 of Title 34 of the Code of Federal Regulations. [Emphasis added.]

7. Section 300.33 of Title 34 of the United States Code of Regulations provides in part that "public agency" includes "any other political subdivisions of the State that are responsible for providing education to children with disabilities."

8. County contends that it is not a public agency for purposes of special education law and is therefore not a proper party to this proceeding because it was not Student's LEA. County cites the case of *Parent v. Sacramento County Office of Education, et al* (March 2010) Cal.Ofc.Admin.Hrgs., Case No. 2010020022, in which an ALJ dismissed the Sacramento County Office of Education (SCOE) from a case on the ground that it was not the pupil's LEA. However, that case is distinguishable in that the pupil had entered into a settlement agreement with the school district who was the LEA, which inured to the benefit of District's employees, agents or representatives. In addition, that ALJ found that SCOE was not the pupil's LEA as a matter of law by relying on Education Code section 56140, which set forth the county's obligations to create and coordinate SELPA plans to ensure a continuum of services and did not purport to be an exhaustive listing of a county office of education's authorities or obligations. Finally, the ALJ did not rule on SCOE's third ground for dismissal, which was that it merely provided related services to the school district under a contract. The order in that case is not binding and is not persuasive. (Cal. Code Regs., tit. 5, § 3085; see also *Student v. Sunny Hills Childrens Services, Marin Co. Ofc.Ed, San Rafael High Sch.Dist., and Marin Co.Mental Health* (February 3, 1997), Cal.Spec.Ed.Hrg.Ofc. Case No. 1128, Order Denying Dismissal of Marin County Office of Education as a Party; and *Student v. Auburn Union High Sch.Dist. and Placer Co.Ofc.Ed* (September 18, 2003),

Cal.Spec.Ed.Hrg.Ofc. Case No. 455, Summary Order Denying Placer County Office of Education's Motion to be Dismissed.)

9. In the present case, as set forth in Factual Findings 1 through 88, there was no evidence that County merely provided a related service to Student under a contract with the District. Instead, County directly provided the special education program, classes, and credentialed school staff. The ED Program was a required special education placement on the continuum of placement options in the NCSC SELPA and it was developed, organized, and operated by the County. County attended Student's IEP meetings, not just as a related service provider, but as the specialized instruction provider in concert with the District. The Education Code provides that joinder of a public agency is not limited to parties who are LEAs. County was a public agency involved in educational decisions regarding Student, under Education Code, section 56501, subdivision (a), and was a public agency that provided Student special education instruction in County's ED Program, under Education Code section 56028.5, staffed by County teachers over whom District had no supervision or control. Accordingly, County was a public agency properly joined in this action.

*Changes in the Laws Applicable to County Mental Health*

10. CMH contends that it is not a public agency for purposes of special education law and is therefore not a proper party to this proceeding. It argues that OAH consequently does not have jurisdiction over CMH because the statutory mandate under Chapter 26.5 for CMH to provide educationally related mental health services was "lifted for the 2010-2011 fiscal year beginning July 1, 2010 . . . ." CMH asserts that it provided services to Student pursuant to a contract with District, and therefore was no different than a private entity or vendor contracting with a school district to provide related services.

11. Prior to July 1, 2011, mental health services related to a pupil's education were provided by a local county mental health agency that was jointly responsible with the school district pursuant to Chapter 26.5 of the Government Code.[14] (Gov. Code §7570, et seq., often referred to by its Assembly Bill name, AB 3632 [Chapter 26.5].) A pupil who was determined to be an individual with exceptional needs and was suspected of needing mental health services to benefit from his or her education, could, after the pupil's parent had consented, be referred to a community mental health service, such as CMH, in accordance with Government Code section 7576. The pupil had to meet the criteria for referral specified

[14] Government Code section 7570 provides that the Superintendent of Education and the Secretary of the Health and Human Services Agency are jointly responsible to provide related services, including mental health services; and section 7571 provides that the Secretary may designate a State department to assume the responsibilities, and shall also designate "a single agency in each county to coordinate the service responsibilities described in Section 7572." These sections have not been amended or repealed in 2011. However, portions of Section 7572 have been amended effective July 1, 2011, subject to amendment or to repeal on January 1, 2012.

in California Code of Regulations, title 2, section 60040; and the school district, in accordance with specific requirements, had to prepare a referral package and provide it to the community mental health service. (Ed. Code, § 56331, subd. (a); Cal. Code Regs., tit. 14, § 60040, subd. (a); Gov. Code § 7576 et seq.)

12. Chapter 26.5, portions of which were not amended or scheduled for repeal in 2011, still provides that:

> All hearing requests that involve multiple services that are the responsibility of more than one state department shall give rise to one hearing with all responsible state *or local agencies* joined as parties. (Gov. Code § 7586, subd. (c).) [Emphasis added.]

*October 2010 Veto of Legislative Funding for Legal Mandate*

13. As set forth in Factual Findings 72 and 73, on October 8, 2010, the California Legislature sent to the prior Governor, Arnold Schwarzenegger, its 2010-11 Budget Act (Ch. 712, Stats. 2010), which, in item 8885-295-0001, provided full funding for Chapter 26.5 mental health services. The funding was in the form of reimbursement to community mental health agencies which had already performed Chapter 26.5 services. On that same day, the Governor signed the Budget Act after exercising his line-item veto authority. One of the items he vetoed was the appropriation for Chapter 26.5 mental health services by county mental health agencies. In his veto message he stated: "This mandate is suspended." (Sen. Bill 870 [SB 870], 2010-11 (Reg. Sess.) (Chaptered), at p. 12.)

14. On February 25, 2011, the California Court of Appeal for the Second Appellate District affirmed that the Governor had authority to veto the funding for the statutory mandate. (*Cal. Sch. Bds. Ass'n v. Edmund G. Brown Jr., Gov.* (2011) 192 Cal.App.4th 1507, review denied June 8, 2011) (*CSBA v. Brown)*.) In doing so, the court distinguished between a gubernatorial action "suspending" the Chapter 26.5 mandate, which would have been an unconstitutional substantive change to the law in violation of the single-subject rule, and the Governor's veto to eliminate a funding appropriation. The court held the latter action was constitutional and resulted in freeing the local agencies from the legal duty to implement the statutory mandate. Thus, even though the Governor characterized his action as "suspending" the statutory Chapter 26.5 mandate, the Court of Appeal upheld his action as a veto of the funding appropriation for Chapter 26.5 services, which by operation of law freed CMH from the legal duty to implement the mandate but did not substantively change the law.

15. As a consequence of the Court's determination that the Governor's exercise of his line-item veto was constitutional, CMH's obligation to provide mental health services was relieved at least as of October 8, 2010. Thereafter, from October 8, 2010, through June 30, 2011, CMH's *implementation* of the statutory mandate to assess and provide mental health services was not legally required.

16. CMH argues that the former Governor's veto was retroactive to July 1, 2010, the beginning of that fiscal year. CMH argues that it was therefore not legally obligated to implement Chapter 26.5 services from that date, citing Government Code section 17581, subdivision (a). That statute gave effect to the Governor's veto, as determined above, by excusing local agencies from implementing any statute "during any fiscal year" for which reimbursement was not appropriated.

17. However, Government Code section 17581, subdivision (c) provides:

> Notwithstanding any other provision of law, *if a local agency elects to implement or give effect to a statute or executive order described in subdivision (a)*, the local agency may assess fees to persons or entities which benefit from the statute or executive order. Any fee assessed pursuant to this subdivision shall not exceed the costs reasonably borne by the local agency. [Emphasis added.]

18. Moreover, the Court of Appeal in *CSBA v. Brown* did not discuss the issue of retroactivity as to substantive legal rights, although the issue clearly involved a fiscal year budget that began on July 1, 2010. In any event, CMH had already implemented the Chapter 26.5 provisions from July 1, through October 8, 2010. CMH's argument that it cannot be held to legal standards based on that performance is not supported by legal authority. In addition, CMH thereafter chose to continue to implement Chapter 26.5 provisions, as shown in its performance after October 8, 2010.

19. The appellate court itself noted that the Legislature's full reimbursement funding item in the Budget Bill for Chapter 26.5 services was to disburse $76 million dollars in federal IDEA monies already received by the State of California, and that the Governor's veto intended to delete the earmark of those funds for Chapter 26.5 services. However, on October 29, 2010, prior to the court's decision, CDE "indicated that it would distribute these funds to county mental health agencies in order to pay for continued provision of Chapter 26.5 services. This provided a short-term solution only; the funds were expected to be fully expended by mid-January, 2011." *(CSBA v. Brown, supra.)*. The appellate court stated:

> In addition to their main challenge in this proceeding, petitioners also question the Governor's use of the veto in this instance [to delete the earmark for the IDEA funds]; however, as the funds have ultimately been allocated in accordance with the Legislature's intent as expressed in the provision vetoed by the Governor, the issue is moot.

20. Thus, the court in *CSBA v. Brown* determined that, despite the Governor's veto of the funding appropriation for local Chapter 26.5 services, CDE elected to, and did disburse $76 million dollars in IDEA funds to local county mental health agencies to continue funding educationally related mental health services through approximately mid-January 2011.

21. As set forth in Factual Findings 72 and 73, at some point in time after October 8, 2010, CMH entered into a contract with County to continue to provide direct mental health services to the school districts in the SELPA. No evidence of a written contract or its specific terms was produced. Nevertheless, presuming the State to have duly performed, CDE disbursed $76 million dollars in public IDEA funds to local county agencies, including County, earmarked for providing related mental health services under Chapter 26.5, of which CMH is the branch that provided educationally related mental health services. The public agencies have pointed to no legal authority for the proposition that the Governor's funding veto "unrang the bell" as to substantive legal rights and responsibilities already implemented pursuant to Chapter 26.5 prior to October 8, 2010, or voluntarily implemented after that date.

22. Based on the foregoing, CMH's continued receipt of public monies was consistent with its statutory rights and responsibilities as a public agency. Since it is a public agency, even CMH's right to contract was governed by statute. (Gov. Code § 23004.) CDE disbursed the public funds, despite the Governor's funding veto, to ensure continuation of related mental health services until local counties were able to formulate a new model for delivery of the educationally related services. During this time, CMH did not inform Student or Mother of any change in the legal relationship between the parties for delivery of Student's necessary mental health services. In these circumstances, County is estopped from denying it was a public agency under the IDEA.

23. While CMH denies that it was a public agency in its delivery of mental health services to Student, CMH does not claim that it was a private entity. Private entities are not subject to direct liability under the IDEA. (20 U.S.C. § 1412(a)(11); *McElroy v. Tracy Unif. Sch. Dist.* (E.D. Cal. Oct. 28, 2008), Civ. No. 2:07-cv-00086-MCE-EFB) 2008 WL 4754831.) In any event, CMH was not a private entity in the first instance, and its agreement to continue providing mental health services did not change its nature. There was no evidence that District agreed to be responsible for CMH's compliance with special education law in delivering related services or to indemnify CMH for such liability associated with the services. Thus, the evidence did not establish that CMH entered into a contract with the District for delivery of related mental health services in a manner similar to that of a private vendor of services. CMH's argument that it did not act as a public agency in providing services to Student after July 1, 2010, or after October 8, 2010, is therefore not persuasive.

*June 2011 Suspension of Chapter 26.5, Subject to Repeal*

24. On June 30, 2011, California Governor Jerry Brown signed into law a new Budget Bill (SB 87) for the 2011-2012 fiscal year, and a trailer bill affecting educational funding (AB 114). Together the two bills did not repeal Chapter 26.5 of the Government Code in its entirety, but made substantial changes to it and related laws, particularly with respect to mental health services. Sections repealed were suspended effective July 1, 2011, and will be repealed by operation of law on January 1, 2012, unless amended in the meantime. In significant part, the obligation of the State Department of Mental Health, and its county designees, including CMH, to assess and provide related mental health services to special education pupils has been suspended, and the statutory responsibilities have been

transferred to the LEAs instead. (See Gov. Code § 7573.) Henceforth, as of July 1, 2011, the LEAs, including District in the instant case, have the lead responsibility to provide related mental health care services to its qualifying pupils.

25. The new budget (SB 87) allocates approximately $221.8 million dollars to LEAs to fund mental health services. Significantly, the new budget makes a one-time appropriation from the State general fund of another $80 million dollars to county mental health agencies to partially backfill county mental health expenditures under Chapter 26.5 for the 2010-2011 fiscal year. (*Ibid*.) In addition, another $98.6 million from the Proposition 63 Mental Health Services Act is diverted by the new budget for county mental health agencies to fund nonsupplanting IEP/mental health care services for the 2011-2012 fiscal year. The law provides that an LEA may develop a contract with its county mental health agency setting forth the details of the two agencies' respective responsibilities, in order to access those funds. (SB 87, item 4440-295-3085.)

26. By virtue of the above, beginning on July 1, 2011, Chapter 26.5 has been fundamentally changed and significant statutory provisions for related mental health services have been suspended, subject to repeal. CMH is no longer statutorily obligated to assess and provide mental health services to qualifying special education pupils under Chapter 26.5, including Student. Therefore, as to CMH's prospective role and responsibilities to Student for the 2011-2012 school year is no longer governed by Chapter 26.5.

27. However, as found above, the June 30, 2011 budget bill for the 2011-2012 fiscal year allocates public monies to reimburse county mental health agencies, including CMH, for IEP-related mental health services delivered during the 2010-2011 fiscal year, one of the years at issue in this case. CMH has not identified any legal authority that would relieve it from liability for past conduct while Chapter 26.5 was operative. CMH has not provided any legal authority that would prohibit OAH from issuing an order providing an equitable remedy based on such past liability. In addition, the passage of legislation effective July 1, 2011, suspending and repealing CMH's statutory obligations regarding the provision of educationally related mental health services is not relevant to CMH's liability for the time period from December 2009 through May 2011 in this case.

28. Taking into consideration all of the forgoing factors, CMH was a public agency operating under the auspices of the State and the County of Santa Cruz, and was statutorily responsible for providing Student mental health services related to his education pursuant to his IEPs, at all relevant times up to October 8, 2010. In addition, CMH chose to remain involved in decisions affecting Student's IEP and offered and provided IEP-related mental health services during the remainder of the 2010-2011 school year through May 2011, for which it was legally entitled to public funds for reimbursement.[15] Therefore, CMH was a

[15] Thus, this case is distinguishable from OAH decisions finding that OAH did not have jurisdiction over county mental health agencies after October 8, 2010, where those decisions were rendered prior to the June 30, 2011 budget bills: (See OAH Case No. 2011020211 (decision issued April 5, 2011); and OAH Case No. 2010110268 (decision

public agency involved in educational decisions regarding Student under Education Code, section 56501, subdivision (a), and was a public agency that provided Student educationally related mental health services under Education Code section 56028.5. Accordingly, CMH was a public agency properly joined in this action.

*Procedural Violations*

29. There are two parts to the legal analysis of whether a school district offered a pupil a FAPE, whether the LEA has complied with the procedures set forth in the IDEA, and whether the IEP developed through those procedures was substantively appropriate. (*Rowley*, 458 U.S. at pp. 206-207.) Procedural flaws do not automatically require a finding of a denial of FAPE. A procedural violation does not constitute a denial of FAPE unless the procedural inadequacy (a) impeded the child's right to a FAPE; (b) significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE; or (c) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(i) & (ii); Ed. Code, § 56505, subd. (j); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484.)

*Parental Participation*

30. IDEA's procedural mandates also require that the parent be allowed to meaningfully participate in the development of the IEP. (*Rowley, supra,* at pp. 207-208.) A parent is a required and vital member of the IEP team. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56341, subd. (b)(1) and 56342.5.) The requirement that parents participate in the IEP process ensures that the best interests of the child will be protected, and acknowledges that parents have a unique perspective on their child's needs. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 891.) Procedural violations that interfere with parental participation in the development of the IEP "undermine the very essence of the IDEA." (*Id.* at p. 892.)

*Issue 1: For the period from August 2009, through May 30, 2011, did District, County, and CMH deny Student a FAPE because they significantly impeded Parents' opportunity to participate in the IEP decision-making process by failing to accurately report to Parents Student's academic progress, attendance, and behavior data?*

31. As set forth in Factual Findings 9 through 13, and Legal Conclusions 29 and 30, Student's IEPs from May 2009 through May 2011 provided that Parents would be informed of Student's progress each trimester by progress summary reports, and that some of Student's annual IEP goals were to be measured by taking daily behavioral data. The evidence established that at each IEP meeting, District, County, and CMH staff regularly summarized Student's then-present levels of performance and his academic and functional

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issued May 20, 2011).) In addition, in those cases the local county mental health agency issued written notice to the families terminating services pursuant to the Governor's veto of funding to implement the AB 3632 mandate in October 2010, and elected not to continue to implement the services.

progress, including summarizing his academic, attendance, and behavioral performance and were not obligated to deliver all of the underlying written data to Parents. Parents did not establish that they were deprived of material information which impeded their participation in the IEP process and the public agencies therefore did not deny Student a FAPE on that basis.

*Substantive FAPE*

*Annual Goals*

32. The IEP must include a statement of measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and a description of how the child's progress toward meeting the annual goals will be measured. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§300.346, 300.347.)

*Issue 2: For the period from August 2009, to the present, did District, County, and CMH deny Student a FAPE because they failed to offer appropriate special education and related services as follows:*

*2(a): Appropriate annual goals?*

33. As set forth in Factual Findings 16 through 25, and Legal Conclusions 2 through 4, and 32, Annual Goal 1 for written expression was not measurable and was inappropriate as a reasonably attainable goal from December 2009 through May 2011, when the violation was finally cured. In addition, Annual Goals 4 and 5, to come to school on time, and to attend school, were not measurable and were not otherwise appropriate to meet Student's needs in those areas, absent additional behavioral interventions and supports in the IEPs. These violations were cured in the May 2011 IEP. These goals were the responsibility of District and County, but not CMH. Therefore, the lack of appropriate annual goals in the above areas denied Student a FAPE.

*Placement in the Least Restrictive Environment*

34. Federal and state laws require school districts to provide a program in the least restrictive environment to each special education pupil. (Ed. Code, §§56031; 56033.5; 34 C.F.R. § 300.114.) A special education pupil must be educated with nondisabled peers to the maximum extent appropriate and may be removed from the regular education environment only when the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); 34 C.F.R. § 300.114(a)(2).) To determine whether a special education pupil could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has required several factors to be evaluated. (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402.) However, if it is determined that a child cannot be educated in a general

education environment, then the analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed., supra,* 874 F.2d at p. 1050.)

35. As part of Chapter 26.5, Government Code section 7576, subdivision (a) provided in part that a local educational agency was not required to place a pupil in a more restrictive educational environment in order for the pupil to receive the mental health services specified in his or her individualized education program if the mental health services could be appropriately provided in a less restrictive setting. Effective July 1, 2011, section 7576 was statutorily suspended and will be repealed on January 1, 2012. However, as set forth in Legal Conclusions 2 through 4, and 34, this criterion for an educationally related mental health placement in a residential facility was consistent with the on-going requirements of special education law for placement of a pupil with a qualifying disability in the least restrictive environment in which the pupil is reasonably likely to obtain educational benefit.

*2(b): A special education placement in a residential treatment center instead of the County ED Program?*

36. Educational placement issues for Student were the responsibility of District and County, but not CMH. As set forth in Factual Findings 26 through 61, and Legal Conclusions 2 through 4, 34, and 35, the evidence established that all of the professionals who worked with Student from the fall of 2009 through the spring of 2011, did not believe Student required a residential placement in order to benefit from his education, including his teachers, CMH therapists, CMH psychiatrist, the County school psychologist who assessed Student for his May 2010 triennial assessment, and other District, County, and CMH professionals who testified.

37. Based primarily on Mother's reports to the public agencies that Student's emotional condition had deteriorated in the fall of 2010 and the early part of 2011, District and County convened IEP meetings on January 20, February 23, April 13, and May 24 and 31, 2011, where the team considered many reasonable and viable alternatives to address Parents' concerns prior to making a residential placement. The evidence established that Parents refused all of the offers for additional services during that time period, until they finally agreed to the SCIA proposal, effective on April 26, 2011. Subsequent to that date, Student's positive responses and attendance at school with the interventions of the SCIA demonstrated that Student could receive educational benefit without a residential placement.

38. In addition, the expert witnesses for the public agencies, Dr. Brown and Dr. Sandow, were more persuasive than Student's expert witness, Dr. Pratt. Dr. Pratt's opinions were therefore not accorded as much weight. In contrast, Dr. Brown's experience and training in educationally related psychiatric services, as well as over three years of knowing Student and observing his emotional upheavals and monitoring his medications, entitled his testimony to more weight. Finally, Dr. Sandow was persuasive that a residential placement was a placement of last resort in the continuum of special education programs.

39. In *Clovis Unified School District v. California Office of Administrative Hearings* (9th Cir. 1990) 903 F.2d 635, at 643, the Ninth Circuit held that, to determine whether a pupil's residential placement was an educationally related placement that is the responsibility of the school district, the "analysis must focus on whether [the pupil's] placement may be considered necessary for educational purposes, or whether the placement is a response to medical, social or emotional problems that is necessary quite apart from the learning process."

40. In *Ashland School District v. Parents of R.J.* (9th Cir. 2009), 588 F.3d 1004, the Ninth Circuit upheld a district court's reversal of a state hearing officer's decision that the district should reimburse the parents for a unilateral residential placement. In that case, like this one, a high school pupil receiving special education services for ADHD engaged in inappropriate conduct outside of school, including defiance of her parents, leaving home without permission, and dating a school custodian. She suffered depression, brief suicidal ideation, and self-harm, as well as a sexual assault. In addition, the pupil's behaviors negatively impacted her school performance, she refused to turn in selected class assignments, and her grades suffered, resulting in failure in three out of five classes. The school district offered additional services including a behavior plan and social skills instruction. Eventually, the parents withdrew their child from school and placed her in a residential treatment center. The Ninth Circuit affirmed the finding that the residential placement "stemmed from issues apart from the learning process, which manifested themselves away from school grounds," and was not necessary for her to obtain educational benefit. (Ibid, at p. 1010.)

41. In the present case, the evidence established that Parents' insistence on placing Student in a residential treatment facility, beginning in January 2011, if not earlier, primarily stemmed from issues apart from Student's learning process, which manifested in the home setting. Student had behavioral problems at home that he had virtually eliminated at school. While Student's attendance and tardiness issues unquestionably impacted his education, and his attendance and tardiness goals and BSP were inappropriate, Parents were also inconsistent in establishing and implementing rules and strategies recommended by the public agencies to work with him. District was not required to provide Student with the "best" education possible, but was required to offer educational placements that were reasonably calculated to provide educational benefit. Based on the foregoing, the evidence established that District's and County's IEP offers for placement in the ED Program at Harbor High were appropriate offers in the least restrictive environment, were reasonably calculated to provide Student with educational benefit, and did not deny him a FAPE.

*Behavior Support*

42. When a child's behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, "strategies, including positive behavioral interventions, strategies, and supports to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i) (2006)[7]; Ed. Code, § 56341.1, subd. (b)(1).) An IEP that does not appropriately address behavior that impedes a child's learning denies a

student a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033 (*Park*); *Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028-1029.)

*2(c): An appropriate BSP?*

43. As set forth in Factual Findings 62 through 67, and Legal Conclusions 2 through 4, and 42, the BSP that District and County offered Student on May 19, 2010, was not appropriate because it primarily dealt with significant negative behaviors at school that Student had not engaged in since middle school, failed to take into account his progress, and was not revised to adjust for that progress. In addition, the BSP did not address Student's continued absences and tardy arrivals, did not support Student's annual Goals 4 and 5, to address tardiness and attendance, and mainly dealt with school-based accommodations, including the daily behavioral point log. The BSP did not deal with Student's behaviors in the home setting that impeded his attendance and promptness at school, and the point system did not work to motivate him. Accordingly, the BSP in the May 2010 IEP was not appropriate and denied Student a FAPE through the end of April 2011, when the SCIA's behavior interventions began.

*Related Mental Health Services*

44. Therapeutic residential placements may be related services that must be provided if they are necessary for the pupil to benefit from special education. (20 U.S.C. § 1401(22); Ed. Code, § 56363, subd. (a).)

*2(d): Appropriate mental health counseling and guidance services and related mental health goals?*

45. As set forth in Factual Findings 68 through 79, and Legal Conclusions 2 through 4, and 44, between December 2009 and January 2011, the public agencies were not placed on notice of any significant change or new or different information which would have given rise to a duty to increase Student's mental health services. Student was making slow but steady progress in many areas. Although promptness and attendance at school were still problematic and inconsistent, the evidence established that other factors were involved, including Parents' own inconsistencies and resistance, and the inappropriateness of Student's annual goals and BSP with regard to attendance and tardiness. The deficiencies in Student's services required additional structured behavioral interventions and supports. As soon as the agencies learned that Parents wanted a residential placement, and that Student was at risk for an out-of-home placement, District, County, and CMH significantly increased the offer for mental health services in order to provide intensive services, along with offering assessments. The IEP offers were therefore reasonably calculated to provide Student a FAPE, and did not deny him a FAPE.

*Transition Plans and Transition Services*

46. Beginning not later than the first IEP to be in effect when a child with a disability turns 16, and updated annually thereafter, the IEP must include appropriate measurable postsecondary goals related to training, education, employment, and, where appropriate, independent living skills. (20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(aa)-(bb); 34 C.F.R. § 300.320(b) (2006); Ed. Code, § 56345, subd. (a)(8).) The postsecondary goals must be updated annually. (*Ibid*.) In addition, every IEP beginning with age 16 must also include transition services to assist the child in reaching those postsecondary goals. (*Ibid*.)

47. "Transition services" means "a coordinated set of activities for an individual with exceptional needs" that: (1) is designed within a results-oriented process that is focused on improving the academic and functional achievement of the individual with exceptional needs to facilitate the movement of the pupil from school to post-school activities, including postsecondary education, vocational education, integrated employment, including supported employment, continuing and adult education, adult services, independent living, or community participation; (2) is based upon the individual needs of the pupil, taking into account the strengths, preferences, and interests of the pupil, and (3) includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, if appropriate, acquisition of daily living skills and provision of a functional vocational evaluation. (20 U.S.C. § 1401(34); Ed. Code, § 56345.1, subd. (a).)

48. The failure to properly formulate a transition plan may be a procedural violation of the IDEA that warrants relief upon a showing of a loss of educational opportunity or a denial of a FAPE. (*Board of Education v. Ross* (7th Cir. 2007) 486 F.3d 267, 276 [despite transition plans being a mandatory component of an IEP, notation in IEP that the transition plan would be "deferred" was procedural violation]; *A.S. v. Madison Metro School Dist.* (D. Wis. 2007) 477 F.Supp.2d 969, 978 [allegation of inadequate transition plan treated as procedural violation].)

*2(e): An appropriate ITP and related transition services?*

49. As set forth in Factual Findings 80 through 88, and Legal Conclusions 2 through 4, and 46 through 48, District's and County's ITP of May 19, 2010, was not in compliance with the law and therefore constituted a procedural violation because the ITP did not contain any requisite postsecondary goals for education or training, employment, or independent living, or any transition activities related to those goals. However, the public agencies had offered and implemented transition services and vocational training for Student in the workability program in the fall of 2010, and Student had made significant progress in performing well and in attending school in order to participate in the program. Therefore the procedural violation did not impede Student's right to a FAPE or cause him to suffer a loss of educational benefit, and the violation was harmless error.

*Material Failure to Implement IEP Services*

50. A failure to implement an IEP will constitute a violation of a pupil's right to a FAPE only if the failure was material. There is no statutory requirement that a district must perfectly adhere to an IEP, and, therefore, minor implementation failures will not be deemed a denial of FAPE. A material failure to implement an IEP occurs when the services a school district provides to a disabled pupil fall significantly short of the services required by the IEP. (*Van Duyn, et al. v. Baker School District 5J* (9th Cir. 2007) 502 F.3d 811, 822.) A party challenging the implementation of an IEP must show more than a de minimus failure to implement all elements of that IEP, and instead, must demonstrate that the school district failed to implement substantial and significant provisions of the IEP. (*Ibid*.) "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail." (*Ibid.*)

*Issue 3: For the period from August 2009, through May 30 2011, did District, County, and CMH deny Student a FAPE because they materially failed to implement the following components of Student's last operative individualized education program (IEP)?*

*3(a) Direct specialized instruction for 360 minutes daily?*

51. As set forth in Factual Findings 89 through 93, and Legal Conclusion 50, beginning in December 2009, Student's operative IEP acknowledged that his tardy arrival to school was related to his disability, and the tardiness was accommodated in order to help support his arrival to school without punitive consequences that would be imposed on a general education pupil for chronic tardy arrival. The accommodation was not inconsistent with the instructional hours otherwise available to Student. CMH therapists uniformly supported working with Student in a positive manner with incentives and rewards instead of punitive consequences. Accordingly, the evidence did not support Student's claim that the public agencies failed to implement the instructional hours as they accommodated Student's disability, and he was not denied a FAPE.

*3(b) Annual IEP goals?*

52. As set forth in Factual Findings 94 and 95, and Legal Conclusion 50, the evidence established that District and County implemented Student's annual goals from December 2009 through May 2011, to the extent that Student attended school. Student's County ED Program teachers regularly worked with Student on his goals. Overall, the evidence did not support Student's contention that District and County materialy failed to implement Student's annual mental health, academic, and behavioral goals, and he was not denied a FAPE on that basis.

*3(c) Accurate reporting to Parents of Student's academic progress, attendance, and behavior data?*

53. As set forth in Factual Findings 96 through 99, and Legal Conclusion 50, the evidence established that, at all of Student's IEP team meetings at issue in this case, staff reported generally on Student's academic progress and progress on his annual goals. There

was no evidence that District and County were required by Student's IEPs to show Parents all written measurement data for his IEP goals or that the IEP summaries were untrue. Additionally, there was no evidence that Parents ever asked for such records in connection with the IEP team meetings. Therefore, the public agencies did not materially deviate from Student's IEPs, and did not deny him a FAPE on that basis.

*3(d) Student's BSPs?*

54. As set forth in Factual Finding 100, and Legal Conclusion 50, beginning in December 2009, Student's IEPs contained a BSP, and he did not sustain his burden of proof to establish that District and County failed to implement his BSP. Student's criticism of the BSP, while valid, is not relevant to the question whether District and County failed to implement the BSP in some material way. Therefore, District and County did not materially deviated from Student's BSPs and did not deny Student a FAPE on that basis.

*3(e) Mental health counseling and guidance services?*

55. As set forth in Factual Findings 101 through 103, and Legal Conclusion 50, the evidence did not support Student's claim that CMH materially failed to deliver mental health counseling services as required by Student's operative IEPs. While there may have been some discrepancies in the CMH records, Student himself declined to participate in therapy on numerous occasions. In January 2011, Parents terminated CMH's access to Student and only permitted limited contact between him and certain CMH staff. Accordingly, the public agencies did not fail to implement Student's mental health services and did not deny him a FAPE on that basis.

*Issue 4: For the period from August 2009, to the present, did CMH deny Student a FAPE because it: (a) failed to provide mental health services in a safe and effective manner; (b) failed to accurately diagnose Student and report findings; and/or (c) significantly impeded Parents' opportunity to participate in the IEP decision-making process regarding either the delivery of records to them; and/or the investigation of a mental health therapist's conduct with Student?*

56. As set forth in Factual Findings 104 through 115, and Legal Conclusions 2 through 30, the evidence did not establish that CMH staff misdiagnosed Student or inaccurately reported diagnostic findings. While Dr. Pratt concluded that Student had a clinical diagnosis of Bipolar Disorder, CMH psychiatrist Dr. Brown disagreed and his opinion was more persuasive based on a variety of factors, including his education and experience and periodic evaluation of Student for over three years. Regardless of Student's medical condition, he remained eligible for special education under the category of Emotional Disturbance and his IEP services were driven by his educational needs.[16] As to Parents' request for records, assuming that CMH committed a procedural violation by not delivering the records to Parents at no cost before the February 23, 2011 IEP meeting, Student did not establish any significant impediment to Parents' participation in the IEP

[16] See California Code of Regulations, title 5, section 3030, subdivision (i).

process, or to Student's receipt of a FAPE, and the violation was therefore harmless error. Finally, on the issue of the mental health therapist's conduct with Student, OAH has no jurisdiction over personnel matters or the authority to order the requested relief to order CMH to investigate Mr. Friedman's conduct, and Student's claim is not within OAH's jurisdiction. Therefore, the evidence did not establish that CMH denied Student a FAPE based on these claims.

*District's duty to assess*

57. Pupils who have qualified for and receive special education services shall be reassessed at least once every three years, and may be reassessed not more frequently than once a year, and unless the parent and the LEA agree otherwise. (Ed. Code, § 56381, subd. (a)(2).) The LEA is also obligated to reassess when the LEA determines that the educational or related services needs of the pupil warrant reassessment or if the pupil's parents or teacher request an assessment. (Ed. Code, § 56381, subd. (a)(1).)

58. Assessments must be conducted by individuals who are both knowledgeable of the pupil's disability and "competent to perform the assessment, as determined by the school district, county office, or special education local plan area." (20 U.S.C. § 1414(b)(3)(A)(iv); Ed. Code, §§ 56320, subd. (g), 56322.) A psychological assessment of pupils shall be conducted by a credentialed school psychologist. (Ed. Code § 56324, subd. (a).) Parents who want their children to receive special education services must allow reassessment by the school district, and cannot force the district to rely solely on an independent evaluation. (*Johnson v. Duneland Sch. Corp.* (7th Cir.1996) 92 F.3d 554, 558; *Andress v. Cleveland Indep. Sch. Dist*. (5th Cir.1995) 64 F.3d 176, 178-79; *Gregory K. v. Longview Sch. Dist. supra*, 811 F.2d 1307, 1315; *Dubois v. Conn. State Bd. of Ed*. (2d Cir.1984) 727 F.2d 44, 48.)

*District's Assessment:*

*Issue 5: Does the District have the right to assess Student in specified areas related to his disabilities set forth in the April 15, 2011 assessment plan without parental consent?*

59. As set forth in Factual Findings 116 through 123, and Legal Conclusions 57 and 58, District has the right to assess Student in the social-emotional and behavioral areas related to his disability that are specified in District's assessment plan dated April 15, 2011, without parental consent.

*Remedies*

60. When an LEA fails to provide a FAPE to a pupil with a disability, the pupil is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*School Committee of Burlington v. Department of Educ.* (1996) 471 U.S. 359, 369-371; 20 U.S.C. § 1415(i)(2)(C)(3).) Compensatory education is an equitable remedy designed to "ensure that the student is appropriately educated within the meaning of the IDEA." The remedy of

compensatory education depends on a "fact-specific analysis" of the individual circumstances of the case. (*Puyallup, supra*, 31 F3d. at 1497.) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Ibid.*) There is no obligation to provide day-for-day compensation for time missed. (*Park v. Anaheim Union High School District* (9th Cir. 2006) 464 F.3d 1025, 1033.)

61. As set forth in Factual Findings 16 through 25, and 124 through 127, and Legal Conclusion 60, effective in December 2009, Student's annual Goal 1 for academic written expression and Goals 4 and 5, to arrive at school timely, and to attend school, were inappropriate and immeasurable. However, because of Parents' failure to cooperate with the public agencies for about three months, Student was denied a FAPE for about 13 months instead of 16 months. As detailed in the Findings, by reason of the inappropriate written expression goal, District and County shall therefore provide Student with compensatory education in the form of 80 hours of individual academic instruction by a qualified and credentialed special education teacher.

62. As set forth in Factual Findings 62 through 67, and Legal Conclusions 60 and 61, District's and County's BSP for Student was also inappropriate and denied him a FAPE beginning May 19, 2010. However, Student had stopped attending school in mid-January 2011. Student was therefore denied a FAPE as to the BSP for about eight months instead of 11 months. Therefore, as detailed in the Findings, based on both this denial of FAPE and that occasioned by the inappropriate behavioral goals for attendance and tardiness, as determined above, District and County shall provide Student with compensatory education in the form of 160 hours of additional behavioral intervention services by a qualified behavior specialist.

62. Because CMH was only responsible to offer and provide related mental health services to Student, and was not responsible to otherwise offer and provide him with specialized academic instruction and other related services, including annual goals or the BSP, CMH is not liable for the compensatory education ordered in this decision.

## ORDER

1. District and County shall provide Student with 80 hours of compensatory education in the form of individual academic instruction by a mutually agreed-upon qualified and credentialed special education teacher not later than December 30, 2013, unless the parties agree in writing to extend the deadline.

2. District and County shall provide Student with 160 hours of compensatory education in the form of behavioral intervention services by a mutually agreed-upon qualified behavior specialist, including direct services, supervision, consultation, and training, not later than December 30, 2013, unless the parties agree in writing to extend the deadline.

3. Within 30 days of the date of this Decision, the parties shall exchange written lists of proposed providers for the above compensatory education services, who are certified NPAs or nonpublic schools, unless Student agrees that District and/or County may provide either service.

4. All of Student's other requests for relief are denied.

5. District may conduct an FAA assessment and a psychological social-emotional assessment of Student pursuant to its assessment plan dated April 15, 2011.

6. If Student wishes to receive special education benefits at public expense, Student, with the assistance of Parents, must make himself reasonably available for the above assessments within 30 days of the date of this Decision. Failure of Student and Parents to cooperate with the assessments may result in the termination of special education services.[17]

## PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed on Issues 2(a) and 2(c). District prevailed on Issue 5. District, County, and CMH prevailed on all other issues.

## NOTICE OF APPEAL RIGHTS

This is a final administrative decision, and all parties are bound by this Decision. The parties are advised that they have the right to appeal this decision to a state court of competent jurisdiction. Appeals must be made within 90 days of receipt of this decision. A party may also bring a civil action in the United States District Court. (Ed. Code, § 56505 subd. (k).)

DATED: November 21, 2011

**/s/**
DEIDRE L. JOHNSON
Administrative Law Judge
Office of Administrative Hearing

[17] However, if Student does not make himself available for the assessments, this shall not negate the above orders for compensatory education.